

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF LOS ANGELES
3 DEPARTMENT 308 HON. CHARLES MC COY, JUDGE
4 RICHARD BOEKEN,)
)
5 PLAINTIFF,)
)
6)
7 CASE NO. BC226593
8 VS.)
)
9 PHILIP MORRIS,)
INCORPORATED, A)
10 CORPORATION; INTERNATIONAL)
HOUSE OF PANCAKES)
11 INCORPORATED, A)
CORPORATION.
12)
DEFENDANTS.)

13 REPORTER'S DAILY TRANSCRIPT OF PROCEEDINGS
14 TUESDAY, APRIL 24TH, 2001

15 APPEARANCES:

16 (FOR PLAINTIFF) LAW OFFICES OF
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25

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1 LOS ANGELES, CALIFORNIA; TUESDAY, APRIL 24TH, 2001

2 9:00 A.M.

3 DEPARTMENT 308 HON. CHARLES MC COY, JUDGE

4

5

6 (THE FOLLOWING PROCEEDINGS

7 WERE HELD IN OPEN COURT IN

8 THE PRESENCE OF THE JURY.)

9

10 THE COURT: HOW IS EVERYONE FEELING?

11 OUR JURY PANEL IS WITH US. COUNSEL

12 ARE PRESENT AS WELL.

13 GOOD MORNING, COUNSEL, GOOD TO SEE

14 YOU.

15 WE ARE READY FOR OUR NEXT WITNESS.

16 MR. PIUZE: THE PLAINTIFF CALLS

17 DR. GREGORY SARNA AS THE NEXT WITNESS.

18 THE COURT: SIR, IF YOU WOULD PLEASE STEP
19 RIGHT OVER HERE.
20
21
22 GREGORY SARNA M.D.,
23 CALLED AS A WITNESS BY THE PLAINTIFF, WAS SWORN
24 AND TESTIFIED AS FOLLOWS:
25 THE COURT: FACE ME, RAISE YOUR RIGHT
26 HAND.
27 YOU SOLEMNLY SWEAR THAT THE
28 TESTIMONY YOU ARE ABOUT TO GIVE IN THIS COURT SHALL
3441
1 BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE
2 TRUTH SO HELP YOU GOD.
3 THE WITNESS: I DO.
4 THE COURT: SIR, YOU MAY BE SEATED.
5 IF YOU WILL PLEASE STATE YOUR FULL
6 NAME FOR THE RECORD AND SPELL YOUR LAST NAME.
7 THE WITNESS: GREGORY PAUL SARNA, S AS IN
8 SAM, A-R-N AS IN NAVY, A.
9 THE COURT: THANK YOU, SIR.
10 MR. PIUZE.
11
12 DIRECT EXAMINATION
13
14 BY MR. PIUZE:
15 Q. GOOD MORNING.
16 A. GOOD MORNING.
17 Q. YOU ARE A MEDICAL DOCTOR?
18 A. YES, I AM.
19 Q. ARE YOU A SPECIALIST?
20 A. I AM A SPECIALIST IN MEDICAL
21 ONCOLOGY WHICH IS THE TREATMENT OF CANCERS FROM THE
22 MEDICAL POINT OF VIEW.
23 Q. OVER THE COURSE OF YEARS, HAVE YOU
24 BEEN A PROFESSOR OF THAT?
25 A. I WAS A PROFESSOR AT UCLA. I WAS
26 AT UCLA FOR 15 YEARS FROM 1975 THROUGH 1990 AND I
27 HAVE BEEN AT CEDARS-SINAI COMPREHENSIVE CANCER
28 CENTER SINCE 1990. I AM A CLINICAL PROFESSOR AT
3442
1 UCLA BUT MY PRACTICE IS IN CEDARS-SINAI CANCER
2 CENTER.
3 Q. BEFORE YOU GET TO BE AN ONCOLOGIST,
4 DO YOU HAVE TO BE AN INTERNIST FIRST?
5 A. YES. ONE FIRST GOES THROUGH
6 MEDICAL SCHOOL AND THEN INTERNAL MEDICINE TRAINING
7 AND THEN ONE TAKES FELLOWSHIP IN MEDICAL ONCOLOGY
8 OR A COMBINED HEMATOLOGY, ONCOLOGY AND THEN ONE IS
9 AN ONCOLOGIST WHEN ONE HAS SUCCESSFULLY COMPLETED
10 THAT ROUTE.
11 Q. ARE YOU AN INTERNIST AS WELL AS
12 BEING AN ONCOLOGIST?
13 A. I AM BOARD CERTIFIED AS AN
14 INTERNIST BUT I DO NOT PRACTICE INTERNAL MEDICINE
15 FOR THE MOST PART. I PRACTICE INTERNAL MEDICINE
16 WITH MY CANCER PATIENTS TO SOME DEGREE, BUT I FOCUS
17 ON CANCER AND MEDICAL ONCOLOGY.
18 Q. THE REASON I AM ASKING ABOUT
19 INTERNAL MEDICINE IS I WANT YOUR EXPERT OPINION, IS
20 CHICKEN SOUP GOOD FOR A COLD?
21 THE COURT: DON'T ANSWER THAT, SIR.
22 Q BY MR. PIUZE: WHERE DID YOU GO TO

23 MEDICAL SCHOOL?
24 A. UCLA MEDICAL SCHOOL.
25 Q. WHEN DID YOU GET OUT?
26 A. IT WOULD HAVE BEEN 1970, I BELIEVE.
27 Q. OVER AT UCLA, ONCE YOU GOT OUT, DID
28 YOU DO -- EXCUSE ME, DID YOU DO A FELLOWSHIP?

3443
1 A. I DID AN INTERNSHIP AND RESIDENCY
2 IN INTERNAL MEDICINE FIRST, THEN I WENT BACK TO THE
3 NATIONAL CANCER INSTITUTE FOR TWO YEARS AS A STAFF
4 ASSOCIATE, THEN I CAME BACK TO UCLA AND TOOK AN
5 ADDITIONAL YEAR OF FELLOWSHIP, THE STAFF ASSOCIATE
6 AT THE NATIONAL CANCER INSTITUTE AND ONE YEAR AT
7 UCLA CONSTITUTES A FELLOWSHIP IN HEMATOLOGY AND
8 ONCOLOGY AND THEN JOINED THE FACULTY AT UCLA AND
9 WAS ON THE FACULTY THERE FOR 15 YEARS.

10 Q. ON BEHALF OF THE COURT REPORTER,
11 COULD I ASK YOU JUST TO SLOW DOWN JUST A TOUCH.
12 A. YES.

13 Q. SO OVER AT UCLA, DID YOU GO
14 ASSOCIATE PROFESSOR, ASSISTANT PROFESSOR, FULL
15 PROFESSOR AND GO LIKE THAT?
16 A. ASSISTANT PROFESSOR COMES FIRST,
17 BUT ASSISTANT THEN ASSOCIATE, THEN FULL, YES.

18 Q. AND YOU DID, YOU MADE ALL THOSE
19 STEPS?

20 A. YES, I DID.
21 Q. AND WERE YOU, AS A PROFESSOR OVER
22 THERE IN UCLA MEDICAL SCHOOL, WERE YOU TEACHING
23 PEOPLE HOW TO TREAT CANCER?
24 A. YES. I WAS IN CHARGE OF THE
25 MEDICAL ONCOLOGY CLINIC WHICH WAS THE BOYER
26 ONCOLOGY CLINIC FOR MOST OF MY TENURE THERE AND
27 THEN I WOULD BE THE MAJOR PERSON TREATING, TEACHING
28 THE FELLOWS AND HOUSE STAFF ABOUT THE TREATMENT OF

3444
1 CANCER PATIENTS.

2 Q. THANKS.
3 NOW, YOU HAVE ALREADY TOLD US
4 AROUND 1990 YOU LEFT UCLA AND WENT OVER TO
5 CEDARS-SINAI; CORRECT?

6 A. YES.
7 Q. WHAT HAVE YOU BEEN DOING OVER THERE
8 SINCE, PLEASE.

9 A. MOST OF WHAT I DO IS THE PRIVATE
10 PRACTICE OF MEDICINE. MEDICAL ONCOLOGY. I ALSO
11 HAVE SOME CLINICAL RESEARCH ACTIVITIES, NOT AS
12 EXTENSIVE AS MY ACTIVITIES WHEN I WAS AT UCLA BUT
13 SOME.

14 Q. LET'S TALK JUST A LITTLE BIT ABOUT
15 YOUR ACTIVITIES WHEN YOU WERE AT UCLA.

16 FIRST OF ALL, IS UCLA A REAL GOOD
17 MEDICAL SCHOOL?

18 A. IT'S A GOOD PLACE.
19 Q. AND IS ONE OF THE THINGS THAT

20 PROFESSORS DO OVER THERE IS RESEARCH?

21 A. IF YOU ARE A FULL TIME FACULTY
22 MEMBER AT UCLA, YOU NEED TO DO RESEARCH, YES.

23 Q. DID YOU DO A LOT OF RESEARCH?

24 A. I DID CLINICAL RESEARCH, YES, WHICH
25 MEANS TESTING THERAPY ON PATIENTS. I WAS NOT
26 INVOLVED IN THE LABORATORY END OF RESEARCH.

27 Q. DID YOU PUBLISH WHILE YOU WERE OVER

28 THERE?

3445

1 A. YES.

2 Q. JUST GIVE THE JURY AN IDEA HOW MANY
3 SCIENTIFIC PAPERS HAVE YOU PUBLISHED, PLEASE.

4 A. IT'S BEEN AWHILE SINCE I HAVE
5 LOOKED. I WOULD GUESS PROBABLY 60 OR SO PEER
6 REVIEWED MANUSCRIPTS. THERE ARE A VARIETY OF OTHER
7 CHAPTERS AND ARTICLES THAT WERE NOT ORIGINAL
8 RESEARCH BUT WERE TO TEACH PEOPLE THE STATE OF ART
9 THERAPY.

10 Q. DID YOU PUBLISH A BOOK ONCE, AN
11 ENTIRE BOOK ON BASICALLY HOW TO TREAT CANCER?

12 A. FOR PRIMARY CARE PHYSICIANS, YES.

13 Q. AND AS FAR AS BOOK CHAPTERS ARE
14 CONCERNED, WHETHER ORIGINAL RESEARCH OR NOT, DO YOU
15 HAVE ROUGHLY 30 DIFFERENT CHAPTERS IN BOOKS HAVING
16 TO DO WITH HOW TO TREAT CANCER?

17 A. I HAVEN'T COUNTED BUT THAT'S
18 PROBABLY A FAIR NUMBER.

19 THERE HAVE BEEN SEVERAL CHAPTERS IN
20 EVERY EDITION OF THE HASKELL ONCOLOGY TEXT, CANCER
21 TREATMENT AND THERE HAVE BEEN A VARIETY OF CHAPTERS
22 IN OTHER TEXTBOOKS AS WELL.

23 Q. THANKS.

24 NOW, YOU MENTIONED TO THE JURY
25 EARLIER THAT ONCE YOU SWITCHED OVER TO CEDARS-SINAI
26 AND TO PRIVATE PRACTICE, YOU ARE STILL A CLINICAL
27 PROFESSOR AT UCLA.

28 TELL THE JURY WHAT THE DIFFERENCE

3446

1 IS BETWEEN YOUR PAST PROFESSORSHIP AND BEING A
2 CLINICAL PROFESSOR?

3 A. WHEN I WAS AT UCLA, I WAS A FULL
4 TIME PROFESSOR THERE. I WAS ON SALARY FROM UCLA, I
5 WOULD TAKE CARE OF PATIENTS BUT THE REVENUE WOULD
6 GO TO UCLA.

7 I -- MY MAJOR ROLE WAS DOING
8 RESEARCH AND ORGANIZING PATIENT CARE. BUT MOST OF
9 THE CARE WOULD BE HANDLED BY THE FELLOWS OR
10 RESIDENTS WITH MY SUPERVISION RATHER THAN DIRECTLY.

11 I MOVED OVER TO CEDARS WHERE I AM
12 AN INDEPENDENT PRACTITIONER RATHER THAN HAVING
13 FELLOWS AND RESIDENTS COORDINATE THE CARE. I DO IT
14 PERSONALLY IN A HANDS-ON FASHION.

15 Q. THANKS.

16 NOW, LET'S TALK ABOUT RICHARD
17 BOEKEN.

18 IS HE YOUR PATIENT?

19 A. YES.

20 Q. HOW DID HE COME TO BE YOUR PATIENT?

21 A. INITIALLY, HE SAW ME IN DECEMBER OF
22 1999. AT THAT TIME, IT WAS FOR A SECOND OPINION
23 RATHER THAN TO BE MY PATIENT.

24 HE HAD PREVIOUSLY BEEN DIAGNOSED
25 WITH A FORM OF LUNG CANCER AND CAME TO ME FOR AN
26 OPINION AS TO FURTHER THERAPY.
27 AT THAT TIME, HE WAS BEING TREATED
28 BY A DIFFERENT MEDICAL ONCOLOGIST, A DR. HEIFITZ.

3447

1 I GAVE HIM MY RECOMMENDATIONS AT A LATER POINT. HE
2 DECIDED TO CHANGE OVER TO MY CARE AND CAME TO SEE
3 ME AND I ASSUMED HIS CARE.

4 Q. SO HE CAME TO YOU FOR A SECOND
5 OPINION AND WOUND UP STAYING FOR TREATMENT?

6 A. THAT IS CORRECT.

7 Q. WHEN YOU FIRST SAW HIM, WAS THAT
8 DECEMBER, '99?

9 A. LET ME CHECK THE SPECIFIC DATE.

10 DECEMBER 14TH, 1999, WAS THE SPECIFIC DATE.

11 Q. WHAT WAS WRONG WITH MR. BOEKEN?

12 A. AT THE TIME THAT I FIRST SAW HIM,
13 HE HAD BEEN DIAGNOSED WITH LUNG CANCER.

14 HE HAD HAD AN X-RAY DONE WHEN HE

15 HAD HAD SOME COUGH, NOT UNLIKE I AM HEARING HERE,
16 AND THAT SHOWED A LESION WHICH DIDN'T BELONG IN THE
17 RIGHT LUNG, IN THE UPPER PORTION OF THE RIGHT UPPER
18 LOBE THAT WAS EVALUATED.

19 HE EVENTUALLY HAD THAT REMOVED

20 ALONG WITH REMOVAL OF SOME OF THE LYMPH NODES IN
21 THE CHEST AND THE TISSUE WAS SHOWN TO BE A CANCER,
22 AN ADENO CARCINOMA, WHICH HAD SPREAD TO LYMPH NODES
23 WITHIN THE CHEST, BOTH IN THE LUMBAR REGION, THE
24 LYMPH NODES WITHIN THE LUNG ITSELF, AND IN THE
25 MEDIASTINUM, MEANING THE AREA IN THE CENTER OF THE
26 CHEST, SEPARATING THE LUNGS FROM ONE SIDE TO
27 ANOTHER. THAT'S AN AREA WHERE THERE'S ALSO HEART
28 AND AORTA, BLOOD VESSELS, OTHER TYPES OF

3448

1 STRUCTURES.

2 THERE WAS NO EVIDENCE AT THAT TIME
3 OF ANY SPREAD ELSEWHERE BASED UPON CAT SCAN OF
4 CHEST AND AT LEAST UPPER ABDOMEN BASED UPON A TYPE
5 OF SCAN, A P.E.T. SCAN WHICH IS VERY GOOD FOR
6 FINDING LUNG CANCER IN OTHER AREAS, AND BASED UPON
7 A BONE SCAN.

8 AND HE CAME TO ME FOR AN OPINION AS

9 TO HOW TO PROCEED FURTHER AND I RECOMMENDED --

10 Q. LET ME STOP YOU FOR A SECOND. SO
11 EVERYTHING YOU JUST SAID TO THE JURY HAPPENED
12 BEFORE HE GOT TO SEE YOU?

13 A. CORRECT.

14 Q. DID MY OFFICE SEND OVER SOME
15 MEDICAL ILLUSTRATIONS TO YOU JUST SO YOU COULD SIGN
16 OFF ON THEM AND SAY THESE LOOKED LIKE THEY ARE
17 ACCURATE REPRESENTATIONS OF WHAT WAS GOING ON?

18 A. YES.

19 Q. I'D LIKE TO SHOW YOU THE FINISHED
20 PRODUCT HERE, 8050.00. YOU SAW A SMALL VERSION OF
21 THIS AT ONE TIME?

22 A. YES.

23 Q. CAN YOU SAY THAT THAT'S AN ACCURATE
24 MEDICAL ILLUSTRATION OF THE MASS THAT SHOWED ON
25 X-RAY?

26 A. I DON'T HAVE THE ORIGINAL FILMS IN
27 FRONT OF ME AND DID NOT HAVE THEM AT THE TIME THAT
28 I REVIEWED THEM. BUT BASED UPON REPORTS, I CAN SAY

3449

1 THAT IS REASONABLY ACCURATE, THAT INDICATES A TWO
2 CENTIMETER MASS. I BELIEVE, THE PATHOLOGY LISTED
3 THE SIZE AS 1 AND A HALF CENTIMETER MASS, BUT TWO
4 MAY HAVE BEEN THE SIZE ON THE X-RAY, AND MAY HAVE
5 HAD SOME SLIPPAGE IN PREPARATION, THAT'S A
6 POSSIBILITY.

7

8 * (EXHIBIT 8050.00 BLOWUP OF

9 MEDICAL ILLUSTRATION,
10 MARKED FOR I.D.)
11
12 Q BY MR. PIUZE: THERE ARE ALSO,
13 THIS ILLUSTRATION, ALSO PICKS UP LYMPH NODES, DO
14 YOU SEE THAT?
15 A. YES.
16 Q. AND IS ALL OF THAT ALSO ACCURATE?
17 A. CAN YOU BRING IT CLOSER TO ME SO I
18 CAN SEE IT.
19 Q. YES. WHAT I WAS HOPING IS YOU
20 COULD COME DOWN HERE SO THE JURY CAN SEE IT, YOU
21 CAN SEE IT, BOTH AT THE SAME TIME.
22 A. THESE STRUCTURES HERE IN GREEN
23 WOULD BE PARATRACHEAL LYMPH NODES AND SOME OF THOSE
24 WERE REMOVED AND DID HAVE CANCER IN IT. THERE ALSO
25 WOULD BE LUMBAR LYMPH NODES WHICH PROBABLY ARE NOT
26 DEMONSTRATED BUT PROBABLY BE IN THE SUBSTANCE OF
27 THE LUNG RIGHT THERE. NOT ALL OF THE GREEN LYMPH
28 NODES WERE REMOVED. ONLY A FEW LYMPH NODES WERE
3450
1 REMOVED, SOME OF THESE WERE POSITIVE.
2 Q. OKAY.
3 THANKS. SO NOW ALL OF THIS HAS
4 HAPPENED BEFORE MR. BOEKEN CAME TO SEE YOU AND
5 YOU HAVE TOLD US HE WANTED A SECOND OPINION, YOU
6 GAVE IT TO HIM; RIGHT?
7 A. YES.
8 Q. WHAT DID YOU TELL HIM, PLEASE.
9 A. I SUGGESTED THAT HE HAVE ADDITIONAL
10 THERAPY. I WAS CONCERNED THAT EVEN THOUGH ALL
11 KNOWN DISEASE WAS REMOVED, THE OVERWHELMING
12 LIKELIHOOD WAS THERE WAS OTHER DISEASE PRESENT.
13 WHEN THE LYMPH NODES OF THE
14 MEDIASTINUM ARE INVOLVED, USUALLY THE DISEASE HAS
15 SPREAD FURTHER AND WE JUST CAN'T FIND IT.
16 TO TRY TO DEAL WITH THAT, I
17 SUGGESTED ADDING CHEMOTHERAPY. CHEMOTHERAPY WOULD
18 BE DRUGS GIVEN TO KILL CANCER CELLS AND THE
19 EXPERIENCE HAS BEEN THAT IT IS A BETTER STRATEGY TO
20 GIVE CHEMOTHERAPY EARLY RATHER THAN TO WAIT FOR
21 DISTANT METASTASES SPREAD TO OTHER AREAS TO SHOW
22 UP.
23 THAT IS, YOU CAN GET MORE EFFICACY
24 TREATING EVEN THOUGH YOU CAN'T SEE WHEN YOU ARE
25 TREATING, BY NOT LETTING ANYTHING GROW RATHER THAN
26 WAITING FOR SOMETHING TO GROW.
27 Q. SO LET ME STOP YOU AGAIN, PLEASE.
28 I KNOW THIS IS ALL LIKE BREATHING
3451
1 OUT AND BREATHING IN TO YOU. BUT BASED ON ALL OF
2 YOUR EXPERIENCE IN THE PAST, TEACHING, RESEARCH,
3 TREATING, ET CETERA, WHEN HE CAME IN, BECAUSE OF
4 THE TYPE OF CANCER HE HAD, DID YOU BELIEVE THAT
5 EVEN THOUGH THERE WAS NO EVIDENCE OF SPREAD, IT HAD
6 PROBABLY SPREAD?
7 A. I THOUGHT IT WAS GREATER THAN 90
8 PERCENT PROBABILITY THERE WAS DISEASE ELSEWHERE,
9 YES.
10 Q. AND SO EVEN THOUGH YOU COULDN'T SEE
11 IT OR TOUCH IT SOMEPLACE ON A FILM, YOU DECIDED TO
12 TREAT IT IN ADVANCE ANYWAY?
13 A. YES.

14 Q. OKAY.
15 A. SO I RECOMMENDED CHEMOTHERAPY AND I
16 ALSO RECOMMENDED RADIATION.
17 CHEMOTHERAPY ARE DRUGS THAT GO
18 THROUGHOUT THE BODY.
19 THEY WORK PRETTY MUCH EVERYWHERE IN
20 THE BODY, ALTHOUGH NOT VERY WELL IN THE BRAIN,
21 WHICH TURNS OUT TO BE AN IMPORTANT ISSUE FOR
22 MR. BOEKEN.
23 BUT THEY, IF THEY ARE GOING TO
24 WORK, TEND TO WORK REASONABLY WELL IN THE LUNG AND
25 THE LIVER, IN THE BONE, AND LYMPH NODES THAT ARE
26 OUTSIDE THE CHEST, IN OTHER PARTS OF THE BODY.
27 THE BRAIN IS A LITTLE BIT
28 DIFFERENT, THE DRUGS DON'T GET THERE THE SAME
3452
1 CONCENTRATIONS, DON'T WORK AS WELL THERE. BUT THE
2 PURPOSE OF CHEMOTHERAPY WOULD BE TO TREAT DISEASE
3 THAT MIGHT HAVE SPREAD, CELLS THAT MIGHT HAVE
4 GOTTEN OUT, THAT WERE ELSEWHERE IN THE BODY AND IN
5 THE LUNG ITSELF.
6 RADIATION WOULD BE DIFFERENT.
7 RADIATION DOESN'T WORK EVERYWHERE IN THE BODY.
8 RADIATION IS A BEAM THAT WORKS WHERE YOU AIM IT,
9 LIKE HOLDING A FLASHLIGHT, LOOKING WHERE THE BEAM
10 GOES. EVERYTHING THAT'S IN THE BEAM IS AFFECTED
11 BUT OUTSIDE THE BEAM IT IS NOT.
12 YOU CAN'T RADIATE THE ENTIRE BODY,
13 THAT WOULD GIVE MUCH TO MUCH TOXICITY, BUT YOU CAN
14 RADIATE OTHER LYMPH NODES THAT WERE LEFT IN THE
15 CHEST.
16 ON THAT DIAGRAM, THERE WERE A
17 VARIETY OF GREEN LYMPH NODES THAT I SAID HADN'T
18 BEEN REMOVED AND THOSE COULD HAVE HAD DISEASE IN
19 IT. WE DIDN'T KNOW WHETHER THEY DID OR DID NOT.
20 THE P.E.T. SCAN HADN'T SHOWN
21 DISEASE BUT THE P.E.T. SCAN HAD MISSED THE DISEASE
22 THAT WAS FOUND SURGICALLY ANYWAY, SO THAT WAS NO
23 GUARANTEE.
24 SO MY FEELING WAS RADIATION SHOULD
25 BE GIVEN TO COVER THOSE LYMPH NODES AND STOP THE
26 DISEASE FROM RECURRING LOCALLY. SO I RECOMMENDED A
27 TREATMENT THEN OF BOTH CHEMOTHERAPY AND RADIATION.
28 Q. THANKS.
3453
1 SO I WAS ABOUT TO STOP YOU AGAIN.
2 JUST TELL US A LITTLE BIT, HOW DOES
3 CHEMO THERAPY WORK, PLEASE.
4 A. IN ONE SENSE, CHEMOTHERAPY IS A
5 TOXIN OR POISON. THE DRUGS WE USE ARE SELECTED
6 BECAUSE THEY ARE MORE TOXIC TO CANCER CELLS THAN
7 THEY ARE TO NORMAL CELLS, AND THAT IN SOME PEOPLE
8 THEY CAN ERADICATE CANCER CELLS WHEREAS THE NORMAL
9 CELLS ARE NOT SEVERELY DAMAGED.
10 THE WAY THESE PARTICULAR DRUGS THAT
11 HE GOT WORKED WAS AFFECTING HOW CELLS DIVIDE BY
12 AFFECTING WHAT'S CALLED THE MITOTIC SPINDLE, WHICH
13 IS PART OF THE SPIDER WEB THAT ALLOWS THE
14 CHROMOSOMES TO GO TO DOUBLE AND TO GO INTO TWO
15 SEPARATE CELLS. SO IT TENDS TO STOP CELLS FROM
16 DIVIDING IN THAT FASHION. I KNOW I AM GETTING A
17 LITTLE COMPLEX NOW.
18 Q. LET ME STOP YOU RIGHT THERE AGAIN,

19 PLEASE.

20 WHAT WERE THE DRUGS?

21 A. CARBOPLATIN AND TAXOL WERE THE TWO
22 DRUGS THAT I RECOMMENDED. IN FACT, HE WAS STARTED
23 ON THOSE DRUGS BY DR. HEIFEZ AND THAT CONTINUED
24 WITH BOTH ME AND THAT WOULD BE THE MOST COMMON
25 STANDARD FORM OF CHEMOTHERAPY IN THIS SITUATION.

26 Q. THANK YOU.

27 NOW, WERE THOSE DRUGS GIVEN IN
28 COURSES SO THAT YOU GET SO MUCH OVER A GIVEN PERIOD
3454

1 OF TIME AND THEN IT GETS REPEATED IN CERTAIN WAYS?

2 A. THE DRUGS WOULD BE GIVEN
3 INTRAVENOUSLY. IT WOULD TAKE PROBABLY SIX HOURS OR
4 SO TO GIVE BOTH DRUGS ALONG WITH THE MEDICINES TO
5 PREVENT NAUSEA, VOMITING, ALLERGIC REACTIONS AND
6 OTHER TYPES OF ACUTE SIDE EFFECTS.

7 THE THERAPY WOULD BE REPEATED

8 ROUGHLY ONCE EVERY THREE WEEKS. SO ONE COURSE
9 WOULD BE GIVEN EVERY THREE WEEKS. IT WOULD BE ONE
10 DOSE GIVEN OVER ROUGHLY SIX HOURS.

11 Q. HOW MANY REPEATS, TYPICALLY?

12 A. IN SOMEONE WHO IS GETTING WHAT WE
13 CALL ADJUTANT THERAPY, THAT IS, THERE IS NOTHING WE
14 NEED TO TREAT, THERE IS NO METASTATIC DISEASE WE
15 ARE TREATING, JUST IN CASE THERE IS SOMETHING
16 THERE. AND THAT WAS THE SITUATION IN MR. BOEKEN IN
17 DECEMBER OF 1999.

18 THE PLAN WAS TO GIVE HIM SIX DOSES.

19 SO AS A PRACTICAL MATTER, WE STOP AT FIVE BECAUSE
20 HE HAD A LOT OF NEUROTOXICITY. THESE DRUGS CAN
21 CAUSE NUMBNESS, TINGLING OF THE HANDS AND FEET
22 WHICH CAN BE BOthersome, CAN CAUSE THROBBING OF
23 OBJECTS, DIFFICULTY BUTTONING BUTTONS, SOMETIMES
24 PAINFUL SENSATION.

25 THOSE SIDE EFFECTS GET BETTER OVER
26 TIME BUT WE STOPPED AT FIVE RATHER THAN SIX BECAUSE
27 HE HAD MORE SIDE EFFECTS THAN WE LIKE AT THIS
28 POINT.

3455

1 Q. SO THE KIND -- THE JURY HAS SEEN
2 AND HEARD MR. BOEKEN TESTIFY ON A VIDEO TAPED
3 DEPOSITION. AND HE DISCUSSED SOME OF THE SIDE
4 EFFECTS THAT HE HAD.

5 FROM YOUR VIEWPOINT, DID HE HAVE,
6 BASICALLY, THE CLASSIC KIND OF SIDE EFFECTS FROM
7 THESE ANTI-CANCER DRUGS?

8 A. THE NUMBNESS, TINGLING, WHAT WE
9 CALL NEUROPATHIC SIDE EFFECTS WE KNOW OCCURS. SOME
10 PEOPLE HAVE IT SOONER. SOME PEOPLE HAVE IT LATER.
11 SOME HAVE MORE. SOME HAVE LESS.

12 HE HAD MORE THAN THE AVERAGE. BUT
13 WE CERTAINLY SEE THE DEGREE HE HAS NOT UNCOMMONLY.
14 AND THIS WOULD BE TYPICAL.

15 Q. AND BECAUSE HE HAD -- IS IT CORRECT
16 THAT BECAUSE HE HAD SOME MORE OF THESE SYMPTOMS
17 THAN MAYBE THE AVERAGE PERSON, IT WAS DECIDED TO
18 CUT HIS DRUG TREATMENT AFTER FIVE COURSES RATHER
19 THAN SIX?

20 A. YES. SIX IS, IS WHAT WE WOULD
21 COMMONLY USE, BUT WE DON'T HAVE ADEQUATE STUDIES
22 THAT TELL US WHETHER SEVEN IS REALLY BETTER THAN
23 SICK OR FIVE IS REALLY JUST AS GOOD AS SIX. SIX IS

24 A FIGURE WE AIM TO, BUT WE HAVE TO ADJUST FOR
25 TOXICITY.

26 Q. GOT IT. THANK YOU.

27 NOW, LET'S GO TO RADIATION THERAPY.

28 A. YES.

3456

1 Q. LET'S TALK ABOUT THAT A BIT.

2 DO YOU PERSONALLY DO THAT?

3 A. NO.

4 Q. ARE THERE OTHER SPECIALISTS WHO DO

5 THAT?

6 A. YES. I AM A MEDICAL ONCOLOGIST BUT
7 THERE ARE RADIATION ONCOLOGISTS WHO DO NOTHING BUT
8 GIVE RADIATION TREATMENTS. MOSTLY FOR CANCER BUT
9 SOMETIMES FOR OTHER ISSUES.

10 Q. WAS MR. BOEKEN ALREADY HOOKED UP
11 WITH A RADIATION ONCOLOGIST WHEN HE CAME TO SEE YOU
12 OR DID YOU REFER HIM TO ONE?

13 A. I BELIEVE I REFERRED HIM. I THINK
14 HE WAS REFERRED BOTH TO CEDARS AND EVENTUALLY IN
15 TARZANA GOT RADIATION THERAPY.

16 Q. AND IN TARZANA, WHO WAS THAT FROM?

17 A. I BELIEVE THAT WAS DR. BOTNICK.

18 Q. NOW, HOW MUCH RADIATION DID HE GET?

19 A. I DON'T HAVE THE PARTICULARS IN
20 FRONT OF ME. TYPICALLY ONE WOULD GET SOMEWHERE
21 BETWEEN 4,500 AND 5,000 CENTIGRADE AT A MINIMUM.
22 OFTEN IT'S PUSHED UP TO 6,000 FOR CURATIVE INTENT.
23 AND I DO NOT KNOW WHICH TOTAL DOSE HE GOT.

24 Q. I ASKED A BAD QUESTION. I WASN'T
25 ACTUALLY GOING FOR DOSE. LET ME ASK A BETTER
26 QUESTION.
27 OVER WHAT PERIOD OF TIME WAS HE
28 GETTING RADIATION THERAPY?

3457

1 A. I DON'T HAVE THE RECORDS IN FRONT
2 OF ME BUT, TYPICALLY, IT WOULD BE FIVE WEEKS OR SO.

3 Q. NOW, AS YOU WERE TREATING MR.
4 BOEKEN WITH DRUGS, AND AS HE WAS BEING SENT OUT FOR
5 TREATMENT WITH RADIATION, IS THERE SOMETHING THAT
6 YOU DO IN ORDER TO CHECK TO SEE IF IT'S WORKING OR
7 NOT?

8 A. WE LISTEN TO THE PATIENT, IF THE
9 PATIENT HAS COMPLAINTS, WE EVALUATE THEM OR I
10 EVALUATE THEM.

11 THERE ARE PERIODIC BLOOD TESTS,
12 PERIODIC X-RAYS, PERHAPS PERIODIC CAT SCANS. THESE
13 ARE THE TYPES OF THINGS THAT WE CAN DO TO TRY TO
14 ASSESS HOW WE ARE DOING.

15 IN SOMEONE WHO HAS KNOWN SPREAD OR
16 METASTATIC DISEASE AND YOU HAVE A LESION TO FOLLOW,
17 YOU KNOW WHAT TESTS TO DO AND YOU CAN REPEAT IT AT
18 INTERVALS TO SEE IF THAT DISEASE SHRINKS OR GROWS.

19 IN SOMEONE WHERE THERE IS NO
20 DISEASE AND YOU ARE TREATING AS AN ADJUNCT, YOU
21 DON'T KNOW WHAT TEST IS GOING TO SHOW SOMETHING.
22 AND USUALLY SYMPTOMS OR PHYSICAL EXAM IS OUR GUIDE
23 AS TO WHEN TO DO TESTS. AND IF TESTS ARE
24 NECESSARY, WHETHER TO DO A BONE SCAN OR A CAT SCAN
25 OR AN M.R.I. OR A P.E.T. SCAN OR WHATEVER.

26 Q. IN MR. BOEKEN'S CASE, ONCE YOU HAD
27 ASSUMED YOUR ROLL AS HIS TREATING MEDICAL
28 ONCOLOGIST, WHAT DID YOU DO TO CHECK TO SEE WHAT

1 THE PROGRESS WAS IN HIS CASE, PLEASE.
2 A. WHEN HE WAS ON CHEMOTHERAPY, I
3 WOULD SEE HIM BEFORE EVERY VISIT. AND I WOULD SEE
4 HIM BETWEEN VISITS TO CHECK HIS BLOOD COUNT FOR
5 SAFETY. AND AT EACH TIME OR APPROXIMATELY EACH
6 TIME HE WOULD BE EXAMINED AND HE WOULD BE EXAMINED
7 AS TO WHETHER THERE WERE PROBLEMS THAT NEED
8 INVESTIGATION.
9 WHEN HE WAS FINISHED WITH THE
10 INITIAL FIVE CYCLES OF CHEMOTHERAPY, HE WAS SEEN AT
11 INTERVALS PROBABLY MONTHLY WITH THE CLEAR
12 INSTRUCTIONS THAT IF THERE WERE PROBLEMS THAT
13 OCCURRED BETWEEN MONTHLY VISITS, HE SHOULDN'T WAIT
14 FOR A MONTHLY VISIT, BUT SHOULD COME IN SOONER.
15 AND AT THAT POINT IN TIME HE WOULD
16 GET A PHYSICAL EXAM, ROUTINE BLOOD TESTS AND IF
17 APPROPRIATE, CHEST X-RAY OR OTHER TYPES OF STUDIES.

18 Q. IN MR. BOEKEN'S CASE, WHAT
19 HAPPENED, IF ANYTHING, TO ALERT YOU THAT THERE HAD
20 BEEN A SPREAD OF THE CANCER?

21 A. ROUGHLY AUGUST, I BELIEVE, OF THE
22 YEAR 2000, HE DEVELOPED SOME PAIN IN HIS BACK.
23 MANY PEOPLE CAN HAVE BACK PAIN FOR TOTALLY BENIGN
24 REASONS, MUSCLE STRAIN OR SPASM, DISK DISEASE AND
25 SO ON.
26 BUT IN SOMEONE WITH A HISTORY OF
27 CANCER AND HIGH RISK FOR CANCER RECURRING, ONE IS
28 ALWAYS CONCERNED THAT BACK PAIN MAY BE FOR A MORE

3459
1 OMINOUS REASON FROM DISEASE THAT WAS SPREAD TO THE
2 BONE.

3 AND STUDIES, AND I DON'T HAVE THE
4 CHART IN FRONT OF ME, BUT I BELIEVE HE HAD M.R.I.
5 AND BONE SCAN AND CAT SCAN, OTHER STUDIES SHOWED
6 DISEASE THAT SPREAD TO HIS LUMBAR VERTEBRAE.

7 Q. SO THAT'S BAD?

8 A. YES. THAT MEANS THE DISEASE IS NO
9 LONGER POTENTIALLY CURABLE. UP TO THAT POINT, WE
10 WERE STILL HOPING TO CURE HIM, EVEN THOUGH IT WAS
11 NOT A LIKELIHOOD. BUT ONCE THE DISEASE HAS SPREAD,
12 IT'S BAD FOR TWO REASONS: ONE, THE DISEASE IS NO
13 LONGER CURABLE AND WE KNOW THAT EVEN IF THAT LUMBAR
14 LESION IS CONTROLLED, OTHER SPOTS WILL SHOW UP.
15 AND SECONDLY, IT'S NOT GOOD TO HAVE
16 PAIN. IT'S NOT GOOD TO HAVE DISEASE IN YOUR SPINE
17 WHICH COULD PRESS ON THE SPINAL CORD OR PRESS ON
18 NERVES OR FRACTURE.

19 SO REGARDLESS OF THE IMPACT IN
20 TERMS OF LONGEVITY AND CURABILITY, ONE DOESN'T WANT
21 THE PAIN AND SUFFERING THAT ARE COMPLICATIONS THAT
22 CAN COME WITH THAT DISEASE.

23 Q. SO WHAT, IF ANYTHING, DID YOU
24 RECOMMEND OR SUGGEST AS A CHANGE IN HIS TREATMENT,
25 ONCE IT TURNED OUT IN AUGUST, 2000 THAT IT HAD
26 SPREAD, THE CANCER HAD SPREAD TO HIS LOW BACK?

27 A. THE OPTIONS AT THAT TIME WERE TO
28 PUT HIM BACK ON A FORM OF CHEMOTHERAPY WHICH COULD
3460
1 CONTROL THE DISEASE IN THE SPINE, IF IT WERE TO
2 WORK, AND COULD WORK ELSEWHERE IN THE BODY,
3 CONTROLLING DISEASE THAT WAS IN OTHER SITES. IF
4 THOSE OTHER SITES WERE BONE OR OTHER AREAS, AS I

5 MENTIONED, THAT DOESN'T WORK VERY WELL IN THE
6 BRAIN, BUT CHEMO THERAPY WORKS FAIRLY WELL
7 OTHERWISE OR CAN WORK WELL OTHERWISE.
8 THE OTHER OPTION WAS TO RADIATE
9 THAT AREA. RADIATION WOULD HAVE THE VIRTUE OF
10 ATTACKING THAT PARTICULAR PROBLEM, USING THE PAIN
11 THERE, DECREASING THE RISK OF LOCAL COMPLICATIONS.
12 BUT IT WOULD ALSO COMPROMISE OUR
13 ABILITY TO GIVE CHEMOTHERAPY WHICH WAS THE WAY WE
14 ARE TRYING TO CONTROL EVERYTHING BECAUSE OF THE
15 TOXICITY OF GIVING THE TWO TOGETHER AND THE EFFECTS
16 ON THE ABILITY OF THE PATIENT'S BLOOD COUNTS TO
17 TOLERATE CHEMOTHERAPY.
18 HAD HE BEEN IN SEVERE DISTRESS,
19 RADIATION WOULD HAVE BEEN GIVEN PROMPTLY. AT THAT
20 TIME, THE SYMPTOMS WERE MODEST ENOUGH THAT WE HAD
21 RELUCTANCE TO GO WITH CHEMOTHERAPY.
22 HE STILL HAD SIGNIFICANT
23 NEUROPATHY. SO I DID NOT WANT TO CHOOSE DRUGS THAT
24 WOULD MAKE HIS NUMBNESS AND TINGLING AND THOSE
25 OTHER SYMPTOMS WORSE. AND SO HE GOT -- RECEIVED A
26 DRUG CALLED GEMCITABINE, G-E-M-C-I-T-A-B-I-N-E,
27 WHICH IS A DRUG WHICH CAN HELP SIGNIFICANT NUMBER
28 OF PATIENTS IN THIS SITUATION AND IS REASONABLY
3461
1 WELL TOLERATED AND WOULD NOT MAKE HIS NEUROPATHY
2 WORSE.
3 Q. DOES THAT DRUG HAVE SOME SORT OF A
4 NUMERICAL NAME AS WELL?
5 A. NO. HE RECEIVED WITH IT A DRUG
6 WITH A NUMERICAL NAME, I THINK C.I.O. 994. WHICH
7 IS AN INVESTIGATIONAL AGENT WHICH WE WERE ADDING TO
8 THAT TO TRY TO MAKE THE GEMCITABINE BETTER.
9 HE WAS INTERESTED IN LOOKING AT
10 INVESTIGATIONAL DRUG STUDIES AND TRYING TO DO
11 EVERYTHING HE COULD TO HELP HIMSELF. AND THIS WAS
12 SOMETHING THAT WE HOPED WOULD MAKE THE GEMCITABINE
13 BETTER AND WE WERE STUDYING, AND THAT WAS ADDED TO
14 THE GEMCITABINE.
15 Q. SO WHAT'S AN INVESTIGATIONAL AGENT?
16 A. I MENTIONED BEFORE ABOUT CLINICAL
17 RESEARCH, WHEN WE TEST SOMETHING THAT IS NOT FULLY
18 STUDIED, THAT IS NEW, THAT IS A HOPEFUL AGENT, THEN
19 IT IS DONE IN AN INVESTIGATIONAL SETTING.
20 WE CAN'T ORDER IT FROM A PHARMACY.
21 WE NEED APPROVAL FROM THE F.D.A. TO STUDY IT, THE
22 FOOD AND DRUG ADMINISTRATION, TO STUDY IT. WE NEED
23 TO HAVE A STUDY APPROVED BY WHAT'S CALLED AN
24 INVESTIGATIONAL REVIEW BOARD WHICH IS A GROUP OF
25 PHYSICIANS AND LAY PEOPLE AND OTHER PROFESSIONALS
26 THAT MAKE SURE THAT WHAT'S BEING DONE IS ETHICALLY
27 CORRECT AND MEDICALLY REASONABLE.
28 THE PATIENT SIGNS AN INFORMED
3462
1 CONSENT FORM SAYING THEY UNDERSTAND THIS MAY OR MAY
2 NOT WORK AND THEY UNDERSTAND THE RISKS OF IT AND WE
3 UNDERSTAND TO COMMUNICATE TO THEM.
4 THE USEFUL TOOLS THAT WE HAVE NOW
5 WERE ONCE INVESTIGATIONAL.
6 EVERY TOOL WE HAVE TO TREAT CANCER,
7 AT ONE POINT, HAD ITS START, AND WHEN IT STARTED,
8 IT WAS SOMETHING THAT WAS JUST BEING STUDIED.
9 MANY OF THE THINGS WE STUDY DON'T

10 WORK, DON'T TURN OUT TO BE USEFUL AND ARE
11 DISCARDED.
12 SOME OF THE THINGS WE STUDY DO
13 WORK, TURN OUT TO BE WINNERS AND ARE ADDED TO OUR
14 USE. ALTHOUGH "WINNER" IS A RELATIVE TERM, WE
15 DON'T HAVE THE WINNERS WE WOULD LIKE TO HAVE. WE
16 HAVE THINGS THAT HAVE SOME ACTIVITY BUT WE DON'T
17 TRULY WIN.

18 Q. SO MR. BOEKEN SIGNED UP FOR SOME
19 SORT OF A TEST?

20 A. HE RECEIVED GEMCITABINE WHICH I
21 CONSIDER THE BEST STANDARD THERAPY. AND IN
22 ADDITION, HE RECEIVED AN INVESTIGATIONAL AGENT
23 WHICH WE HOPED WOULD MAKE THE GEMCITABINE BETTER.

24 Q. OKAY. HOW DID HE DO?

25 A. HIS BACK LESION STABILIZED AND
26 IMPROVED A LITTLE BIT AND NO NEW SKELETAL LESIONS
27 OR OTHER LESIONS SHOWED UP. AND FROM THAT POINT OF
28 VIEW, FOR SEVERAL MONTHS, HE DID WELL.

3463

1 AROUND DECEMBER OF THE YEAR 2000,
2 HOWEVER, HE DEVELOPED SYMPTOMS WHICH HE ATTRIBUTED
3 TO THE TREATMENT AND COMMUNICATED TO ME THAT HE WAS
4 HAVING SOME WEAKNESS AND DIZZINESS AND OTHER ISSUES
5 THAT HE THOUGHT THESE WERE SIDE EFFECTS OF THE
6 TREATMENT AND HE WANTED TO STOP THE TREATMENT
7 BECAUSE OF THAT.

8 Q. WHAT DID YOU THINK ABOUT THAT?

9 A. I WAS NOT WILLING TO ASSUME THAT
10 HIS CONCLUSION THAT THIS WAS FROM A TREATMENT WAS
11 CORRECT. I WAS CONCERNED THAT THERE WAS A MORE
12 SERIOUS CAUSE FOR HIS SYMPTOMS, THAT THE DISEASE
13 HAD SPREAD TO THE BRAIN, WHICH COULD CAUSE THESE
14 SYMPTOMS; WHEREAS, THE THERAPY WOULD NOT BE
15 EXPECTED TO DO THAT.

16 Q. WELL, IF YOU WERE SUSPICIOUS THAT
17 THE SYMPTOMS HE WAS HAVING WEREN'T FROM THE DRUGS
18 BUT WERE FROM MORE BAD LUCK, WHAT DID YOU DO ABOUT
19 IT?

20 A. WELL, WE NEEDED TO DETERMINE
21 WHETHER THE DISEASE HAD SPREAD TO THE BRAIN, SO WE
22 DID AN IMAGING STUDY WHICH, AS I RECALL, WAS AN
23 M.R.I. AND THAT DID SHOW SEVERAL METASTASES TO THE
24 BRAIN.

25 Q. LET ME STOP YOU AGAIN.
26 IS THIS, I AM SHOWING NOT TO THE
27 JURY YET, 8050.01, IS THIS ANOTHER MEDICAL
28 ILLUSTRATION THAT YOU TOOK A LOOK AT IN SMALLER

3464

1 FORM AND GAVE YOUR APPROVAL OF?

2 A. YES.

3

4 * (EXHIBIT 8050.01, BLOWUP OF
5 MEDICAL ILLUSTRATION,
6 MARKED FOR I.D.)

7

8 Q BY MR. PIUZE: SO CAN I COACH YOU
9 DOWN ONE MORE TIME.
10 IT SAYS MULTIPLE METASTASES OF THE
11 BRAIN, 1/26/2001. AND ASK YOU TO GIVE SOME
12 COMMENTS ON THAT. I WOULD JUST LIKE TO POINT OUT
13 WE HAVE FOUR JURORS OVER THERE, OVER YOUR LEFT
14 SHOULDER, WHO HAVE TO BE ABLE TO SEE.

15 A. THIS IS THE BRAIN AS YOU VISUALIZE
16 IT FROM THE SIDE. AND THESE LINES HERE ARE
17 CROSS-SECTIONS AND THEN THESE PICTURES HERE ARE
18 WHAT THE BRAIN WOULD LOOK LIKE IF YOU HAD A
19 CROSS-SECTION OF THAT.
20 WITH A CAT SCAN OR AN M.R.I. YOU
21 CAN GET IMAGES THAT SHOW YOU THERE NICELY WHAT THE
22 BRAIN LOOKS LIKE AT VARIOUS LEVELS AS YOU TAKE
23 VISUAL SLIDES, BUT A VISUAL SLIDE DOWN THE BRAIN.
24 SO THIS LEVEL "A" IS AT THE BOTTOM
25 OF THE BRAIN. THIS HERE IS THE CEREBELLUM.
26 Q. LET ME STOP YOU FOR A SECOND, OKAY,
27 PLEASE, BECAUSE, AGAIN, YOU DO THIS EVERY SINGLE
28 DAY.

3465

1 THIS IMAGE HERE, WOULD WE GET THAT
2 IMAGE IF WE TOOK A SAW AND CUT --
3 A. LOOKING AT ME FROM THE SIDE, YES,
4 IF YOU LOOK AT THE SIDE OF THE BRAIN, THIS IS THE
5 BACK HERE, THIS IS WHERE THE BACK OF THE BRAIN,
6 THIS IS THE FRONTAL LOBE, THIS IS RIGHT UP HERE IN
7 THE FRONT, THIS IS THE FRONT OF THE BRAIN, THE BACK
8 OF THE BRAIN LOOKING FROM THE SIDE.
9 Q. OKAY. BEFORE WE GO FURTHER, THESE
10 OTHER IMAGES, IS THIS WHAT WE GET IF WE TOOK A SAW
11 AND CUT-OFF THE TOP OF THE SKULL?
12 A. RIGHT, GO STRAIGHT THROUGH.
13 THIS IMAGE HERE IS AT THE BOTTOM OF
14 THE BRAIN. THAT'S WHERE THIS LINE PROBABLY SHOULD
15 BE A LITTLE BIT LOWER. THIS AREA HERE WITH A LOT
16 WAVY LINES IS CALLED THE CEREBELLUM AND THAT
17 EFFECTS YOUR COORDINATION. AND SO WHEN PEOPLE HAVE
18 DIZZINESS AND PROBLEMS WITH COORDINATION, WE ARE
19 CONCERNED ABOUT CEREBELLUM AND THERE WERE SOME
20 SPOTS IN THE AREA OF THE CEREBELLUM TO ACCOUNT FOR
21 THAT.

22 THESE ARE SLICES AT HIGHER LEVELS
23 WHICH GO THROUGH THE CORTEX THAT EFFECT MOTOR
24 ACTIVITY, SENSOR ACTIVITY AND A VARIETY OF
25 DIFFERENT PROBLEMS WHICH HE DIDN'T REALLY HAVE THAT
26 HE COULD IDENTIFY BECAUSE YOU CAN HAVE SPOTS THAT
27 ARE SUBTLE UNTIL THEY GROW TO A BIGGER SIZE. BUT
28 OTHER SPOTS WE SEE AT OTHER LEVELS. BUT THESE ONES
3466

1 DOWN HERE WOULD BE THE ONES THAT WOULD ACCOUNT FOR
2 THE SYMPTOMS THAT WAS A CLUE THAT HE NEEDED TO HAVE
3 AN M.R.I. OF THE BRAIN DONE.
4 Q. SO IS THIS AN ACCURATE MEDICAL
5 REPRESENTATION OF WHAT THESE MULTIPLE METASTASES
6 LOOKED LIKE, GENERALLY?
7 A. REASONABLY ACCURATE.
8 Q. REASONABLY ACCURATE.
9 OKAY. SO SEEING THESE -- WHAT DOES
10 METASTASES MEAN, WHAT'S THE DEFINITION?
11 A. METASTASES ARE SPREAD FROM A
12 PRIMARY TUMOR TO A DIFFERENT, DISTANT AREA.
13 CHANGE IN SITE, "META," GREEK FOR
14 CHANGE, "STASIS" IS SITE OR STANDING OR CHANGING
15 WHERE IT IS.
16 A TUMOR THAT STARTS IN THE LUNG AND
17 SPREADS TO THE BRAIN OR SPREADS TO THE BONE OR
18 SPREADS TO THE LIVER OR SPREADS TO THE LYMPH NODE,
19 THOSE ARE ALL METASTASES. DISTANT SPREAD, ONCE IT

20 HAS SPREAD DISTANTLY, WE DON'T EXPECT IT TO STOP.
21 Q. NOW, BUT RATHER -- I AM GOING TO
22 BRING THIS BACK HERE IN A MINUTE, BUT RATHER THAN
23 BRING YOU WHACK HERE A THIRD TIME, I AM GOING TO DO
24 WHAT I WANTED TO DO.

25 WAS MR. BOEKEN DIAGNOSED BY A
26 PATHOLOGIST AT CEDARS-SINAI WITH PAPILLARY ADENO
27 CARCINOMA?

28 A. THAT WAS THE DIAGNOSIS THAT WAS
3467

1 REACHED, YES.

2 Q. DO YOU KNOW WHAT BRONCHIOLOALVEOLAR
3 IS?

4 A. YES.

5 Q. OBVIOUSLY.

6 CLINICALLY, LET'S STOP THERE. I AM
7 GOING TO ASK YOU, HERE'S THE QUESTION, DON'T ANSWER
8 IT. THE QUESTION IS GOING TO BE, CLINICALLY, AS A
9 RESULT OF WHAT HAPPENED TO MR. BOEKEN, HOW HIS
10 CANCER SPREAD, I AM GOING TO ASK YOU WHETHER OR NOT
11 YOU THINK HE HAD PAPILLARY ADENO CARCINOMA OR
12 WHETHER HE HAD BRONCHIOLOALVEOLAR.

13 MR. CARLTON: OBJECTION, YOUR HONOR, NOT
14 CALLED AS AN EXPERT. TREATING PHYSICIAN.

15 THE COURT: WELL, BUT TREATING PHYSICIANS
16 CAN HAVE OPINIONS. IF HE HAS FORMED ONE.

17 MR. CARLTON: CAN WE ASK HIM IF IT IS
18 RELEVANT TO ANYTHING HE DID AS A TREATING
19 PHYSICIAN.

20 THE COURT: FOUNDATION.

21 MR. PIUZE: SURE. WHICH IS WHERE I WAS
22 GOING.

23 THE COURT: FAIR ENOUGH.

24 Q BY MR. PIUZE: BEFORE I ASK YOU
25 YOUR OPINION, WHEN I USE THE WORD "CLINICALLY,"
26 WHAT DOES THAT MEAN, CLINICALLY, DID HE HAVE --
27 LET'S NOT TALK ABOUT MY EXACT QUESTION.

28 IF I SAY CLINICALLY DID HE HAVE "X"

3468

1 OR DID HE HAVE "Y," WHAT DOES THE WORD "CLINICALLY"
2 MEAN, PLEASE?

3 A. IF WE ARE MAKING A CLINICAL
4 JUDGMENT, THAT MEANS WE ARE LOOKING AT WHAT THE
5 TUMOR LOOKS LIKE ON X-RAY, HOW IT BEHAVES. YOU ARE
6 TAKING IN EVIDENCE OTHER THAN PATHOLOGICAL, OTHER
7 THAN UNDER A MICROSCOPE AND REACHING A JUDGMENT AS
8 TO WHAT IS GOING ON.

9 THERE ARE TIMES WHEN WE MAKE A
10 CLINICAL DIAGNOSIS WITHOUT ANY BIOPSIES WHATSOEVER
11 BECAUSE IT WOULD BE TOO DANGEROUS TO MAKE A BIOPSY.
12 THAT'S PRETTY RARE THESE DAYS. BUT IN SELECTIVE
13 PEOPLE WHO HAVE A TUMOR THAT STARTS IN THE BRAIN
14 RATHER THAN SPREADS TO THE BRAIN FROM SOMEWHERE
15 ELSE, IT MIGHT BE TOO DANGEROUS TO DO A BIOPSY. WE
16 MIGHT DO TOO MUCH DAMAGE AND WE WOULD HAVE TO REACH
17 A CLINICAL DIAGNOSIS.

18 AND I HAVE A PATIENT NOW WHO HAS A
19 HISTORY OF BOTH BREAST CANCER AND OVARIAN CANCER
20 WHO HAS A SPOT IN HER BRAIN. I DON'T KNOW WHICH
21 ONE IT IS. BUT IT IS TOO DANGEROUS BECAUSE OF THE
22 LOCATION TO PUT A NEEDLE IN TO FIND OUT WHICH ONE.
23 AND I HAVE TO REACH A CLINICAL
24 JUDGMENT AND BASE MY TREATMENTS ON THAT CLINICAL

25 JUDGMENT BECAUSE I DON'T HAVE PATHOLOGY AND I CAN'T
26 SAY "FORGET PATHOLOGY." SO A CLINICAL JUDGMENT OR
27 A CLINICAL ASSESSMENT IS BASED UPON DATA OTHER THAN
28 WHAT THE TUMOR LOOKS LIKE UNDER THE MICROSCOPE.

3469

1 Q. CLINICALLY, IN OTHER WORDS, THE WAY
2 IT BEHAVES, DOES PAPILLARY ADENOCARCINOMA, I AM NOT
3 TALKING ABOUT ANY SLIDE NOW, I AM TALKING ABOUT
4 INSIDE OF A PERSON, DOES IT BEHAVE DIFFERENTLY THAN
5 BRONCHIOLOALVEOLAR CARCINOMA?

6 A. YES.

7 Q. HOW?

8 A. THE BRONCHIOLOALVEOLAR CARCINOMA IS
9 A TYPE OF ADENOCARCINOMA WHICH, IF IT IS LOCALIZED
10 IN JUST ONE SPOT, CAN BE CURED. BUT WHEN IT IS
11 SPREAD, TENDS TO SPREAD WITHIN THE LUNG, TENDS TO
12 SPREAD AS LOTS OF LITTLE DOTS IN THE LUNG, USUALLY
13 FIRST IN A CLUSTER AROUND THE ORIGINAL TUMOR AND
14 THEN IT MAY SPREAD THROUGHOUT THAT LUNG, AND IN
15 FACT, SPREAD OTHER PLACES.

16 IN SEVERE CASES IT LOOKS LIKE THERE
17 IS A SNOW STORM. YOU HOLD UP AN X-RAY, THERE ARE
18 LOTS OF LITTLE DOTS EVERYWHERE, A SNOW STORM OR
19 SUGAR HAS BEEN SPRINKLED EVERYWHERE.

20 ONE CAN GET SPREAD TO DISTANT SITES
21 SUCH AS BRAIN OR BONE, BUT TYPICALLY THAT'S VERY
22 LATE, AFTER YOU HAVE EXTENSIVE DISEASE IN BOTH
23 LUNGS.

24 SO IF ONE SAYS, I HAVE A PATIENT
25 WHO HAD A SINGLE SPOT IN THE LUNG, IT SPREAD TO THE
26 LYMPH NODE, AND THEN SPREAD TO BONE AND TO BRAIN,
27 IS THAT A TYPICAL CLINICAL BEHAVIOR FOR A
28 BRONCHIOLOALVEOLAR CARCINOMA, MY ANSWER IS NO, THAT
3470

1 WOULD BE QUITE ATYPICAL BECAUSE OF THE USUAL
2 PATTERN OF SPREAD.
3 IS IT A TYPICAL BEHAVIOR FOR OTHER
4 FORMS OF ADENOCARCINOMA OF THE LUNG, I WOULD SAY
5 YES, PROBABLY THAT'S ADENOCARCINOMA OF THE LUNG
6 SPREAD TO BONE, BRAIN, LUNG, WITHOUT MULTIPLE TINY
7 LESIONS.

8 Q. SO BASED UPON THE WAY MR. BOEKEN'S
9 CANCER SPREAD, WERE YOU TREATING HIM FOR PAPILLARY
10 ADENOCARCINOMA OR FOR BRONCHIOLOALVEOLAR CARCINOMA?
11 MR. CARLTON: OBJECTION, RELEVANCE TO
12 TREATMENT.

13 THE COURT: NO, THIS IS A DECISION THE
14 PHYSICIAN WOULD MAKE.

15 OVERRULED.

16 THE WITNESS: I HAD NO REASON TO BELIEVE
17 THAT HE HAD BRONCHIOLOALVEOLAR CARCINOMA, EITHER
18 CLINICALLY OR PATHOLOGICALLY. HE WAS TREATED AS AN
19 ADENO, THE PAPILLARY SUBTYPE OF ADENOCARCINOMA, DID
20 NOT EFFECT MY TREATMENT. I WOULD TREAT HIM THE
21 SAME AS OTHER SUBTYPES OF ADENOCARCINOMA.

22 Q. WELL, LET'S JUST BE CLEAR, WERE YOU
23 TREATING HIM FOR ADENOCARCINOMA AND NOT THE
24 SUBTYPE, BRONCHIOLOALVEOLAR CARCINOMA?

25 A. YES. AN ADENOCARCINOMA OF THE
26 LUNG, THAT STARTS IN THE LUNG, DIDN'T START ANY
27 WHERE ELSE IN THE LUNG.

28 Q. AND THAT'S A POINT.

3471

1 OBVIOUSLY YOU KNOW WHAT A PRIMARY
2 LESION IS.
3 A. A PRIMARY LESION IS WHERE THE
4 CANCER STARTS.
5 Q. DID HIS CANCER START IN THE LUNG?
6 A. YES.
7 Q. WAS IT A PRIMARY LESION OF THE
8 LUNG?
9 A. YES.
10 Q. I AM GOING TO PULL UP 8050.02 HERE.
11 YOU KNOW DR. GELLER?
12 A. YES.
13 Q. IS HE A PATHOLOGIST OVER AT CEDARS?
14 A. YES, HE IS.
15 Q. THIS COMES OFF OF THE CENTER --
16 THIS COMES OFF OF THE PATH REPORT. I WANT TO DRAW
17 YOUR ATTENTION TO TWO THINGS, FIRST OF ALL, THE --
18 LUNG DIAGNOSIS, WHICH WAS PAPILLARY ADENOCARCINOMA
19 OF THE LUNG, MODERATELY WELL DIFFERENTIATED, GOES
20 ON TO SAY OTHER THINGS.
21 BUT I ALSO WANT TO DRAW YOUR
22 ATTENTION TO THE FACT THAT THERE WAS A FROZEN
23 SECTION DONE DURING THE SURGERY, EXCUSE ME, PRIOR
24 TO THE SURGERY, AND READ OUT AS LYMPH NODE 1,
25 NEGATIVE, LYMPH NODE 2, NEGATIVE, LYMPH NODE 3,
26 BRONCHIOLOALVEOLAR CARCINOMA.
27 NOW, I JUST POINTED THAT OUT TO
28 YOU. YOU HAVE SAID, AS YOU WERE STANDING HERE,
3472
1 THAT BOTH PATHOLOGICALLY AND CLINICALLY HE DIDN'T
2 HAVE BRONCHIOLOALVEOLAR CARCINOMA, BUT LOOK AT
3 THAT.
4 A. THAT'S A FROZEN SECTION. A FROZEN
5 SECTION IS NOT AS GOOD AS A PERMANENT SECTION. A
6 FROZEN SECTION IS TAKING MATERIAL FRESH THAT THE
7 SURGEON HAS GIVEN THE PATHOLOGIST, LOOKING AT IT
8 WITHOUT STAIN, WITHOUT ABILITY TO STUDY IT, WITHOUT
9 AN ABILITY TO LOOK AT AREA AFTER AREA AFTER AREA.
10 FROZEN SECTION IS A QUICK AND DIRTY TEST TO SAY IS
11 IT CANCER OR NOT?
12 WE DON'T EXPECT A FROZEN SECTION TO
13 BE PERFECT AND GIVE US PROPER DETAILS.
14 IF THERE'S A DISCREPANCY BETWEEN
15 THE FROZEN SECTION AND THE PERMANENT, THE PERMANENT
16 IS THE ONE THAT IS ALWAYS CORRECT BECAUSE IT IS
17 DONE WITH PROPER TECHNIQUE, PROPER STAINING AND
18 EXTENSIVE ABILITY TO LOOK AT TISSUE RATHER THAN
19 JUST LOOKING AT SOMETHING UNSTAINED.
20
21 * (EXHIBIT 8050.02 BLOWUP OF
22 MEDICAL ILLUSTRATION,
23 MARKED FOR I.D.)
24
25 Q BY MR. PIUZE: THANK YOU.
26 NOW, BACK TO 8050.01, WHICH IS THE
27 MEDICAL ILLUSTRATION OF THE METASTASES TO THE
28 BRAIN. WHEN YOU SAW THIS, I GUESS FOR OPENERS,
3473
1 THAT'S REALLY BAD NEWS?
2 A. YES. PREVIOUSLY WHEN WE KNEW THERE
3 WAS DISEASE IN THE BRAIN, WE KNEW THE DISEASE WAS
4 NOT CURABLE. NOW THIS DISEASE SAYS THAT THE
5 LIFESPAN IS QUITE LIMITED AND THERE ARE LIKELY

6 GOING TO BE SUBSTANTIAL PROBLEMS.
7 Q. WHAT DID YOU TELL MR. BOEKEN?
8 A. I TOLD HIM THAT HE HAD DISEASE IN
9 THE BRAIN. I TOLD HIM THAT THERE ARE SEVERAL
10 LESIONS AND SURGERY WAS NOT AN OPTION. WE DO
11 SOMETIMES DO SURGERY FOR A BRAIN METASTASIS WHEN IT
12 IS SOLITARY AND THERE IS ONLY ONE, WHERE IT IS AN
13 AREA WHERE WE CAN REMOVE IT WITHOUT DOING A LOT OF
14 HARM WHEN THE REST OF THE DISEASE IS WELL
15 CONTROLLED. THIS WOULD NOT HAVE HELPED MR. BOEKEN.
16 THERE WERE TOO MANY LESIONS. THEY WERE IN AREAS
17 THEY COULDN'T BE REMOVED LIKE THE CEREBELLUM AND
18 THE REST OF THE DISEASE WAS NOT ADEQUATELY
19 CONTROLLED.
20 I FELT THAT IT WOULD HELP HIS
21 SYMPTOMS BY PUTTING HIM ON DEPADRON, WHICH IS A
22 STEROID, TO DECREASE SWELLING RATHER OF TUMORS IN
23 THE BRAIN AND OFTEN MAKE THE WEAKNESS, DIZZINESS,
24 OTHER SIDE EFFECTS FROM THE TUMORS GET BETTER.
25 DOESN'T MAKE THE TUMOR GO AWAY BUT IT MAKES THE
26 EFFECTS GO AWAY.
27 IT IS TEMPORARY AND THERE ARE A LOT
28 OF SIDE EFFECTS FROM STEROIDS OVER A LONG PERIOD OF
3474
1 TIME BUT IT IS USEFUL.
2 I TOLD HIM THAT HE NEEDED TO HAVE
3 RADIATION TO THE BRAIN TO TRY TO SHRINK THESE
4 LESIONS AND CONTROL THEM.
5 I DON'T RECALL WHETHER HE ASKED THE
6 HARD QUESTIONS ABOUT SURVIVAL AND WHETHER WE
7 DISCUSSED THEM AT THAT TIME. BUT THE IMPLICATIONS
8 WOULD BE SURVIVAL USUALLY MEASURED IN MONTHS RATHER
9 THAN YEARS, AND THAT WHILE RADIATION COULD HELP, IT
10 WOULD BE A SHORT-TERM GOAL NOT A LONG-TERM CONTROL.
11 Q. OKAY. SO HE GOT THE STEROIDS?
12 A. YES.
13 Q. HE GOT THE RADIATION?
14 A. YES.
15 Q. JUST AS YOU HAD PREVIOUSLY
16 EXPLAINED TO THE JURY, WHEN YOU KNEW HE HAD LUNG
17 CANCER, YOU DID CERTAIN THINGS, YOU KNOW, FOLLOWED
18 HIM, CHECKED, SEE HOW HE WAS DOING, DID THAT
19 CONTINUE AFTER HE WAS DIAGNOSED WITH SPREAD TO THE
20 BRAIN AND WITH NEW TREATMENT FOR THE BRAIN CANCER?
21 A. MY RECOLLECTION IS, I DON'T HAVE
22 THE RECORDS WITH ME, THAT AT THAT TIME, WE LOOKED
23 TO SEE WHETHER THERE WAS SPREAD ELSEWHERE AND THERE
24 WAS NOT, OTHER THAN THE SPOTS WE KNEW ABOUT IN THE
25 BONE, BECAUSE THE DISEASE WAS, AT THAT POINT,
26 LIMITED TO THE BRAIN AND THE BONE. I RECOMMENDED
27 HE NOW HAVE THE RADIATION TO THE SPINE TO TRY TO
28 AVOID PAIN OR PROBLEMS THERE SINCE WE COULD NOT
3475
1 ADEQUATELY TREAT THE DISEASE IN THE BRAIN WITH
2 CHEMOTHERAPY.
3 SUBSEQUENT TO THAT, AND MORE
4 RECENTLY, HE'S BEEN RESTAGED WITH REPEAT SCANS.
5 THE DISEASE WAS RESTAGED PROBABLY TWO, THREE WEEKS
6 AGO. THE LESIONS IN THE BRAIN WERE STILL THERE BUT
7 A LITTLE BIT BETTER. RADIATION HAS HAD SOME
8 BENEFIT.
9 WE WEREN'T SEEING NEW LESIONS IN
10 THE BRAIN AND HE WAS CLINICALLY DOING BETTER, IN

11 TERMS OF HIS NEUROLOGIC SYMPTOMS.
12 AND THE STUDIES DID NOT SHOW NEW
13 LESION IN THE BONE OR ELSEWHERE IN THE BODY.
14 SO FOR THE MOMENT, THE DISEASE IS
15 NOT RAMPANTLY GROWING AND WE DON'T HAVE HIM ON
16 CHEMOTHERAPY AT THIS TIME.

17 Q. WHAT DOES RESTAGED MEAN, PLEASE?
18 A. REPEATING CAT SCANS, BONE SCANS, TO
19 TRY TO DETERMINE WHETHER NEW SPOTS HAVE SHOWN UP
20 SINCE THE DISEASE SPREAD TO THE LUMBAR SPINE. WE
21 KNOW IT CAN SPREAD TO BONE AND CERTAINLY THERE WAS
22 EVERY EXPECTATION THAT A NEW BONE SCAN MIGHT SHOW
23 SEVERAL LESIONS OF NEW BONES.
24 CAT SCAN COULD SHOW DISEASE IN THE
25 CHEST OR DISEASE IN THE LIVER OR THE LYMPH NODES IN
26 THE ABDOMEN OR THE ADRENAL GLANDS.
27 THE REPEAT M.R.I. COULD HAVE SHOWN
28 NEW LESIONS IN THE BRAIN. WE WERE CHECKING TO SEE
3476

1 WHETHER THERE WERE NEW PROBLEMS.
2 IF WE HAD SEEN WORSENING DISEASE IN
3 THE BRAIN, THAT WOULD HAVE, OF COURSE, BEEN VERY
4 OMINOUS AND THE OPTIONS WOULD HAVE BEEN LIMITED.
5 IF THERE WERE ONLY ONE LESION, ONE
6 COULD HAVE ADDED MORE RADIATION WITH A FOCUSED FORM
7 CALLED STEREOTACTIC RADIOSURGERY OR SOMETHING
8 CALLED GAMMA KNIFE, THEY ARE ABOUT THE SAME.
9 SO IT WAS WORTHWHILE TO ASK THAT
10 QUESTION, AND, FORTUNATELY, WE WEREN'T SEEING
11 GROWTH OF THE LESIONS, ALTHOUGH I WOULD RATHER HAVE
12 SEEN THOSE LESIONS DISAPPEAR, WHICH THEY DIDN'T.
13 IF THERE WERE RAPIDLY GROWING
14 DISEASE IN THE LIVER OR MULTIPLE NEW LESIONS IN
15 BONE AND THE DISEASE IN THE BRAIN WAS CONTROLLED,
16 THAT WOULD HAVE BEEN OUR ARGUMENT TO START BACK ON
17 CHEMOTHERAPY TO TRY TO CONTROL THE DISEASE THAT WAS
18 NOW THE MOST THREATENING AND MOST PRESSING.

19 BUT AT THIS POINT, THAT'S NOT
20 HAPPENING. SO IT IS MY PREFERENCE AND HIS
21 PREFERENCE NOT TO GO AHEAD WITH FURTHER
22 CHEMOTHERAPY NOW BUT TO LET HIM RECOVER AS MUCH
23 FROM WHAT HE HAS BEEN THROUGH.

24 Q. OKAY, THANKS.
25 NOW, ARE THERE SIDE EFFECTS TO THE
26 DECADRON STEROIDS?

27 A. YES.
28 Q. WHAT?
3477

1 A. ACUTELY, ONE CAN HAVE MOOD CHANGES,
2 YOU CAN BECOME IRRITABLE, HARD TO SLEEP, SUGARS CAN
3 GO UP. SOMETIMES PEOPLE NEED TREATMENT FOR
4 DIABETES UNDER THOSE CIRCUMSTANCES, CAN CAUSE ACNE.
5 LONGER TERM CAN CAUSE CHANGES IN
6 HOW YOU LOOK, YOUR FACE GETS SWOLLEN, YOU LOSE
7 MUSCLE MASS, YOUR TORSO GETS SWOLLEN BUT YOUR ARMS
8 AND LEGS TEND TO LOSE MUSCLE MASS. AND WE CALL
9 THAT EFFECT CUSHINGOID CHANGE.
10 THERE CAN BE ACNE. THERE CAN BE
11 SORT OF PURPLISH LINES ON THE SKIN CALLED STRIAE.
12 THERE MAY BE INCREASED RISK OF CERTAIN UNUSUAL
13 INFECTIONS, YEAST INFECTIONS, VIRAL INFECTIONS,
14 PARASITIC INFECTIONS.
15 THERE CAN BE, AT TIMES, DAMAGE TO

16 CERTAIN JOINTS, LIKE THE HIPS OR MUSCLE WEAKNESS.
17 WE DO NOT LIKE TO KEEP PEOPLE ON LONG-TERM HIGH
18 DOSE STEROIDS BECAUSE ALL THESE SIDE EFFECTS ADD
19 UP.

20 Q. DID MR. BOEKEN COMPLAIN OF CERTAIN
21 THINGS THAT YOU TOOK TO BE SIDE EFFECTS OF THE
22 STEROID?

23 A. HE HAD EMOTIONAL CHANGES, SLEEP
24 DISTURBANCE, OTHER TYPES OF ISSUES, DID NOT LIKE
25 THE DECADRON. WE TAPERED HIM OFF FOR THAT REASON.
26 AFTER HE WAS OFF, HIS SYMPTOMS CAME
27 BACK A BIT AND INCREASED AND WE HAD TO PUT HIM BACK
28 ON STEROIDS A SECOND TIME. BUT INSTEAD OF USING
3478

1 DECADRON, WHICH IS THE USUAL STEROID, I, THIS TIME,
2 USED PREDNISONE AND HE TOLERATED THAT A BIT BETTER.
3 AND WE HAVE BEEN TAPERING HIM OFF THAT, AND SO FAR,
4 AS OF HIS LAST VISIT, THAT'S GOING ALL RIGHT AND WE
5 ARE GETTING HIM DOWN TO LOW DOSE NOW.

6 Q. THANKS.

7 YOU MENTIONED THAT HE HAD EMOTIONAL
8 CHANGES. AT SOME POINT, DID YOU HAVE SOMETHING TO
9 DO WITH HIM GOING TO SEE A PSYCHIATRIST, MAYBE ONLY
10 ONE TIME, I AM NOT SURE, BUT SEEING A PSYCHIATRIST?

11 A. I BELIEVE HE SAW DR. STRAUSS AT OUR
12 INSTITUTION AND I BELIEVE I REFERRED HIM TO
13 DR. STRAUSS TO TRY TO HELP HIM TO COPE WITH THESE
14 TYPES OF ISSUES.

15 Q. NOW, AS A RESULT OF EITHER THE
16 DISEASE OR THE MEDICINES THAT YOU RECOMMENDED, OR
17 THE STEROIDS, OR SOME COMBINATION OF ALL OF THE
18 ABOVE, DO PEOPLE SOMETIMES COMPLAIN ABOUT MENTAL
19 FUZZINESS UNABLE TO FOCUS THEIR ATTENTION ON STUFF?

20 A. YES.

21 Q. IS THAT UNCOMMON?

22 A. AT THE TIME THAT HIS BRAIN
23 METASTASES WERE DIAGNOSED, I BELIEVED THERE WAS
24 MORE THAN JUST CHEMOTHERAPY GOING ON.
25 PEOPLE WHO HAVE CHEMOTHERAPY
26 SOMETIMES COMPLAIN THAT THEIR SHORT-TERM MEMORY IS
27 NOT QUITE AS GOOD, THEIR FOCUSING IS NOT QUITE AS
28 GOOD. IF YOU HAVE A STUDENT WHO YOU ARE TREATING
3479

1 WITH CHEMOTHERAPY, THEY MAY HAVE TO DROP OUT OF
2 SCHOOL FOR A WHILE BECAUSE THEY CAN'T FOCUS AND
3 STUDY AND REMEMBER THINGS AS WELL.
4 USUALLY THESE ARE SUBTLE AND MINOR
5 CHANGES AND WHEN CHEMO THERAPY IS STOPPED, USUALLY
6 THESE THINGS RETURN TO NORMAL IN SIX MONTHS TO A
7 YEAR.

8 SOME OF OUR MEDICINES CAN EFFECT
9 THESE THINGS IN A VERY SHORT TERM BASIS. WE GIVE A
10 MEDICINE CALLED ATIVAN SOMETIMES TO HELP WITH
11 NAUSEA AND VOMITING.

12 IF YOU HAD HAD ATIVAN AND WE WERE
13 HAVING THIS CONVERSATION, YOU MIGHT BE PERFECTLY
14 LUCENT BUT TOMORROW YOU MAY NOT REMEMBER IT.
15 IT WOULDN'T EFFECT YOUR MEMORY FOR
16 OTHER THINGS. BUT WHILE IT IS IN YOUR BLOOD STREAM
17 YOU WOULDN'T BE PROCESSING THE MEMORY VERY WELL.

18 Q. DID HE HAVE THAT?
19 A. I DON'T RECALL WHETHER HE HAD
20 ATIVAN TO PREVENT NAUSEA OR VOMITING OR NOT.

21 GENERALLY, IT WOULD ONLY WORK, CAN CAUSE PROBLEMS
22 FOR SIX OR EIGHT HOURS AND THEN WOULD HAVE WORN
23 OFF.

24 Q. MR. BOEKEN'S WIFE WAS IN HERE A
25 COUPLE DAYS, TESTIFIED AS RECENTLY AS YESTERDAY.
26 AND ONE OF THE THINGS SHE SAID IS THAT HE SPENDS AN
27 AWFUL LOT OF HIS TIME SLEEPING NOW. SO I WOULD
28 LIKE YOU TO JUST ASSUME HE SAID THAT. IS THAT
3480

1 SURPRISING TO YOU?

2 A. THAT WOULD BE ATTRIBUTED TO HIS
3 DISEASE. THAT WOULD NOT BE ATTRIBUTED TO THE
4 CHEMOTHERAPY OR THE STEROIDS.

5 Q. I WASN'T TRYING TO POINT TO ANY
6 SPECIFIC THING, BUT ANY COMBINATION?

7 A. NO, THAT WOULD NOT BE A SURPRISE
8 AND THAT WOULD BE AN EFFECT OF THE DISEASE.

9 Q. WHY IS THAT?

10 A. THE DISEASE OF THE BRAIN CAN HAVE
11 THAT EFFECT.

12 Q. NOW, ADENOCARCINOMA, SMOKING, IS
13 THERE SOME KIND OF A LINK?

14 A. YES.

15 Q. WHAT?

16 A. SMOKING CAUSES ADENOCARCINOMA OF
17 THE LUNG. TOBACCO SMOKING CAUSES -- A SMOKER HAS
18 20 TIMES THE RISK, ROUGHLY.

19 MR. CARLTON: OBJECT, YOUR HONOR, AGAIN,
20 TREATING PHYSICIAN.

21 THE COURT: YES. WE HAVE HAD LOTS OF
22 TESTIMONY ON THIS PARTICULAR AREA. IF IT RELATES
23 TO HIS TREATMENT AND THERE IS A CONNECTION THERE --
24 MR. PIUZE: I WILL WITHDRAW THE QUESTION.

25 THE COURT: THANK YOU, SIR.

26 MR. PIUZE: LET ME GO ON TO SOMETHING
27 SLIGHTLY DIFFERENT.

28 Q BY MR. PIUZE: CAN YOU GIVE AN
3481

1 OPINION AS TO THE AVERAGE REDUCTION IN LIFE THAT
2 LONG-TERM SMOKERS FACE, AS OPPOSED TO SOMEONE THAT
3 DOESN'T SMOKE?

4 MR. CARLTON: SAME OBJECTION.

5 THE COURT: SAME PROBLEM? IT RELATES TO
6 THIS MAN AND HIS SITUATION AND THE REDUCTION IN HIS
7 LIFE FROM A CLINICAL PERSPECTIVE THEN IT WILL BE
8 PERMISSIBLE.

9 Q BY MR. PIUZE: WELL, I GUESS BY
10 THE TIME YOU SAW MR. BOEKEN, YOU KNEW HE HAD A VERY
11 LIMITED LIFE EXPECTANCY, DIDN'T YOU?

12 A. YES.

13 Q. WELL THEN, I WILL BACK OFF OF THAT
14 QUESTION TOO.

15 CAN I CONFER WITH COUNSEL HERE FOR
16 ABOUT 30 SECONDS OR LESS.

17 THE COURT: YES.

18

19 (COUNSEL CONFER SOTTO VOCE.)

20

21 Q BY MR. PIUZE: I'D LIKE TO SHOW
22 YOU SOMETHING. EXCUSE ME. I APOLOGIZE. SOMETHING
23 I AM GOING TO MAKE 10,005.

24

25 * (EXHIBIT 10,005, MEDICAL

26 RECORDS, MARKED FOR I.D.)

27

28 MR. PIUZE: AND IT IS JUST A LIST OF

3482

1 TREATMENT PROVIDERS, MEDICAL TREATMENT PROVIDERS,
2 CEDARS, AND THE COMPREHENSIVE CANCER CENTER, AND
3 TOWER MEDICAL, ROBERT MCKENNA.

4 IS ROBERT MCKENNA THE SURGEON?

5 A. YES.

6 Q. DR. TRABULUS, UCLA MEDICAL CENTER,
7 PACIFIC PALISADES, ST. JOHN'S HEALTH CENTER, VALLEY
8 RADIO THERAPY, SAN PEDRO PATHOLOGY MED. CENTER,
9 TOWER MEDICAL IMAGING, AND THERE'S A BIG BILL FROM
10 SAV-ON DRUGS.

11 ANYWAY, I DON'T HAVE TO -- DON'T
12 WANT TO TALK ABOUT THE INDIVIDUAL NUMBERS, BUT IF
13 MR. -- WAS ALL OF THE TREATMENT THAT MR. BOEKEN GOT
14 NECESSARY TO HELP HIM, AS BEST AS POSSIBLE, ALONG
15 THE WAY?

16 A. AS FAR AS I AM CONCERNED, THE
17 ANSWER IS YES. I CAN'T THINK OF THINGS THAT WERE
18 DONE THAT WERE UNNECESSARY.

19 Q. AND AS FAR AS THE AMOUNT OF THE
20 BILLS, AND JUST FOR NOW, WE WON'T MENTION THAT
21 EXACT NUMBER BECAUSE WE ARE GOING TO HAVE OUR
22 COMPETING ADDING MACHINES GO OVER THEM TO MAKE SURE
23 THEY ARE ACCURATE, BUT IF I SAID A QUARTER OF A
24 MILLION BUCKS, \$250,000 IN ROUND NUMBERS, IS THE
25 TAB TO TREAT CANCER LIKE THIS, IS THAT REASONABLE?

26 A. IS IT REASONABLE? IT IS PROBABLY
27 NOT REASONABLE. BUT IT IS REAL. IT'S ACCURATE.
28 THAT'S THE BALLPARK FIGURE FOR IT.

3483

1 IS THAT REASONABLE? WE WISH WE HAD
2 MORE EFFECTIVE THERAPY. WE WISH THERAPY WERE MUCH
3 CHEAPER, BUT THAT'S THE REAL WORLD.

4 Q. SO WHAT I AM GETTING AT IS, HOW
5 ABOUT THIS: IS THE AMOUNT OF MONEY REASONABLE TO
6 TREAT WHAT HE HAD?

7 A. IF YOU ARE ASKING IS IT REASONABLE
8 IN THE SENSE, IS THIS WHAT IT COSTS, YES.

9 Q. YEAH, THAT'S WHAT I MEAN.

10 A. YES.

11 Q. SO FORGIVE ME FOR ASKING --

12 A. I AM NOT MAKING A JUDGMENT FOR HOW
13 MUCH SOCIETY SHOULD BE SPENDING, BUT IS THIS WHAT
14 IT COSTS, YES.

15 Q. OKAY.

16 I AM DONE. THANK YOU VERY MUCH.

17 THE COURT: ALL RIGHT, SIR.

18

19 CROSS-EXAMINATION

20

21 BY MR. CARLTON:

22 Q. GOOD MORNING, DR. SARNA.

23 A. GOOD MORNING.

24 Q. IN TERMS OF CHEMOTHERAPY TREATMENT,
25 IT DOESN'T REALLY MATTER TO YOU WHETHER A DISEASE
26 IS B.A.C. OR ADENOCARCINOMA; RIGHT?
27 A. BRONCHIOLOALVEOLAR WOULD BE TREATED
28 WITH SIMILAR AGENTS, SIMILAR REGIMENTS THAN OTHER

3484

1 FORMS OF ADENOCARCINOMA. THE DATA WE HAVE ARE NOT

2 AS EXTENSIVE BUT SHOWS COMPARABLE RESPONSE RATES
3 AND SO THE REGIMENTS OF CHOICE WOULD NOT BE
4 DICTATED BY WHICH HISTOLOGY IT WAS.
5 Q. DO YOU RECALL PERIODS DURING WHICH
6 MR. BOEKEN WAS UNDERGOING CHEMOTHERAPY?
7 A. HE WAS UNDERGOING CHEMO THERAPY
8 FROM THE END OF 1999 THROUGH, PERHAPS, MAY.
9 LET ME TAKE A LOOK -- SORRY, HIS
10 INITIAL THERAPY STARTED DECEMBER 16TH OF 1999 AND
11 HIS FIFTH AND LAST DOSE OF YOUR FIRST REGIMENT,
12 WHICH IS CARDOPLATNIM AND TAXOL WAS ON MARCH 17TH
13 OF YEAR 2000. HE THEN STARTED THE GEMCITE, C.I. 99
14 FOR TREATMENT THAT I TALKED ABOUT EARLIER ON AUGUST
15 22ND OF YEAR 2000. AND IT LOOKS LIKE HIS LAST DOSE
16 WAS ON OCTOBER 3RD OF YEAR 2000.

17 Q. SO THOSE ARE THE TWO ROUNDS OF
18 CHEMOTHERAPY THAT HE HAS UNDERGONE?

19 A. YES.

20 Q. THAT CHEMOTHERAPY DIDN'T IMPACT OR
21 EFFECT HIS COGNITIVE ABILITIES, DID IT?
22 A. SOME PEOPLE, AS I MENTIONED, MAY
23 HAVE MINOR CHANGES IN SHORT-TERM MEMORY AND IN
24 TERMS OF ATTENTION OR FOCUSING. AND IT IS
25 CONCEIVABLE THAT THE CHEMOTHERAPY HAD SOME EFFECT.
26 WHEN HE COMPLAINED TO ME OF CHANGES
27 THAT HE ATTRIBUTED TO CHEMOTHERAPY IN, I GUESS IT
28 WAS OCTOBER WHEN WE DIAGNOSED HIS BRAIN MET., THAT
3485

1 WAS HIS THEORY. BUT I BELIEVE THE DISEASE IN THE
2 BRAIN HAD CAUSED THOSE PROBLEMS.

3 Q. SO IN THEORY, THERE COULD BE SOME
4 MINOR COGNITIVE EFFECT FROM THE CHEMOTHERAPY?
5 A. MINOR CHANGES, YES.

6 Q. YOU DON'T RECALL ANY NOTICING THAT
7 THE CHEMOTHERAPY HAD ANY PARTICULAR IMPACT ON
8 MR. BOEKEN, IN THAT RESPECT?
9 A. IN TERMS OF THE INITIAL CARBOPLATIN
10 AND TAXOL THERAPY, I DON'T RECALL HIM HAVING
11 CHANGES IN THAT RESPECT.
12 IN TERMS OF THE SECONDARY THERAPY,
13 THE CHANGES I ATTRIBUTED TO THE BRAIN METASTASIS.

14 Q. THAT WAS THEN IN EARLY DECEMBER OF
15 LAST YEAR; RIGHT?

16 A. FROM DECEMBER OF 1999 THROUGH MARCH
17 OF 2000 WAS HIS INITIAL THERAPY.

18 Q. I AM TALKING ABOUT THE BRAIN
19 METASTASES.

20 A. I BELIEVE THAT WAS DIAGNOSED IN
21 SOMEWHERE AROUND OCTOBER. BUT LET ME CHECK.
22 SORRY. THAT WAS NOVEMBER 29TH THAT
23 I ORDERED THE SCAN SO THAT WAS ABOUT DECEMBER.

24 Q. SO YOU NOTICED THAT HE WAS
25 COMPLAINING OF A FEW THINGS. YOU ATTRIBUTED THAT
26 TO THE DISEASE IN THAT TIME PERIOD; RIGHT?

27 A. PRIOR TO THE M.R.I. I WAS CONCERNED
28 AND SUSPICIOUS THAT IT WAS THE DISEASE AND THAT'S
3486

1 WHY I DID THE M.R.I.
2 AND UNTIL I HAD THE RESULTS OF THE
3 M.R.I., DIDN'T KNOW FOR A FACT THAT THAT WAS THE
4 CAUSE.
5 Q. ULTIMATELY, THOUGH, THAT WAS YOUR
6 CONCLUSION?

7 A. YES.

8 Q. AND THEN THE RADIATION WAS
9 ADMINISTERED TO REDUCE THE SIZE OF THE LESION IN
10 HIS BRAIN?

11 A. THE RADIATION WAS ADMINISTERED IN
12 AN ATTEMPT TO SHRINK THE LESIONS OF THE BRAIN AND
13 TO STOP THEM FROM GROWING AND TO STOP NEW LESIONS
14 FROM APPEARING.

15 Q. AND THAT APPEARS TO HAVE BEEN THE
16 EFFECT?

17 A. AT THIS POINT, WE DON'T SEE NEW
18 LESIONS AND WE SEE A LITTLE BIT OF SHRINKAGE. IF I
19 HAD TO GRADE THE EFFECTS OF RADIATION THERAPY FROM
20 BEST TO WORST, IT WOULD CERTAINLY NOT BE BEST
21 BECAUSE THE LESIONS DIDN'T DISAPPEAR. AND IT
22 CERTAINLY WOULDN'T BE WORST BECAUSE THEY HAVEN'T
23 GROWN AND THEY ARE NOT NEW LESIONS.
24 IT WOULD BE AN INTERMEDIATE EFFECT.

25 THERE HAS BEEN SOME BENEFIT. WE WOULD HAVE
26 PREFERRED MORE.

27 Q. OKAY. AND THE RADIATION ITSELF
28 DOESN'T IMPACT MR. BOEKEN'S COGNITIVE ABILITIES?

3487

1 A. NOT IMMEDIATELY.

2 RADIATION TO THE BRAIN CAN HAVE A
3 DELAYED EFFECT ON COGNITION. SOMETIMES SEVERE, BUT
4 USUALLY THAT IS A YEAR OR TWO YEARS, FIVE YEARS
5 DOWN THE ROAD. AND IN A DISEASE THIS SEVERE, WE
6 ARE, FRANKLY, WORRIED ABOUT SHORTER PERIODS OF
7 TIME.

8 Q. AND ANY EFFECT THAT THE
9 CHEMOTHERAPY MIGHT HAVE HAD ON HIS COGNITIVE
10 ABILITIES DISAPPEARS WITH TIME AFTER CHEMOTHERAPY
11 IS OVER?

12 A. GENERALLY-SPEAKING, WE EXPECT IT TO
13 LARGEMLY RESOLVE WITHIN A YEAR TO TWO.

14 MR. CARLTON: THANK YOU. NOTHING
15 FURTHER.

16 MR. PIUZE: YOUR HONOR, I FORGOT TO ASK
17 ONE QUESTION.

18 THE COURT: RE-OPEN.

19

20 REDIRECT EXAMINATION

21

22 BY MR. PIUZE:

23 Q. IS MR. BOEKEN GOING TO RECOVER FROM
24 THIS DISEASE?

25 A. NO.

26 MR. PIUZE: THANK YOU.

27 MR. CARLTON: NOTHING FURTHER.

28 THE COURT: SIR, YOU MAY STEP DOWN.

3488

1 THE WITNESS IS EXCUSED.

2 I THINK WHAT WE WILL DO IS GO AHEAD
3 AND TAKE A BREAK RIGHT NOW.

4 FAIR ENOUGH?

5 ALL RIGHT, LADIES AND GENTLEMEN,
6 IT'S 10:15. WE WILL TAKE A 15 MINUTE BREAK UNTIL
7 10:30. DON'T DISCUSS THE CASE WITH ANYONE.

8 THANK YOU.

9

10 (AT THIS TIME, A RECESS
11 WAS TAKEN.)

12
13 THE COURT: ALL RIGHT. LET'S GET GOING.
14 OUR JURY PANEL IS WITH US. COUNSEL ARE PRESENT AS
15 WELL.
16 MR. PIUZE: PLAINTIFF CALLS BERNARD LEWAK
17 AS PLAINTIFF'S WITNESS.
18 THE COURT: SIR, IF YOU WOULD PLEASE STEP
19 FORWARD.
20 SIR, IF YOU WOULD JUST FACE MY
21 CLERK, RAISE YOUR RIGHT HAND TO BE SWORN AS A
22 WITNESS IN THIS MATTER.
23
24
25 BERNARD LEWACK,
26 CALLED AS A WITNESS BY THE PLAINTIFF, WAS SWORN
27 AND TESTIFIED AS FOLLOWS:
28 THE CLERK: YOU DO SOLEMNLY SWEAR THE
3489
1 TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING
2 BEFORE THIS COURT, SHALL BE THE TRUTH, THE WHOLE
3 TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.
4 THE WITNESS: I DO.
5 THE CLERK: THANK YOU. YOU MAY BE
6 SEATED.
7 AND IF YOU WILL STATE YOUR FIRST
8 AND LAST NAME AND SPELLING YOUR LAST NAME, PLEASE.
9 THE WITNESS: LAST NAME IS LEWAK,
10 L-E-W-A-K. FIRST NAME IS BERNARD.
11
12 DIRECT EXAMINATION
13
14 BY MR. PIUZE:
15 Q. GOOD MORNING.
16 A. GOOD MORNING.
17 Q. WHAT'S YOUR OCCUPATION, PLEASE.
18 A. I AM A CERTIFIED PUBLIC ACCOUNTANT.
19 Q. WHAT WAS LAST MONDAY'S DATE?
20 A. APRIL 16TH.
21 Q. AND WAS LAST MONDAY THE END OF THE
22 OFFICIAL HUGE TAX RUSH?
23 A. YES, IT WAS.
24 Q. DID I ASK YOU A COUPLE MONTHS AGO
25 TO DO ME KIND OF A FAVOR?
26 A. YES, YOU DID.
27 Q. AND WHAT WAS THE FAVOR THAT I ASKED
28 YOU TO DO FOR ME?
3490
1 A. YOU ASKED ME TO REVIEW SOME INCOME
2 TAX RETURNS FOR MR. AND MRS. BOEKEN FROM SOME
3 PREVIOUS YEARS AND TO WRITE YOU A LETTER AS TO WHAT
4 THE AMOUNT OF THE INCOME WAS AS REFLECTED ON THOSE
5 TAX RETURNS WHICH HAD BEEN PREPARED BY SOME OTHER
6 TAX PREPARERS.
7 Q. AND SUBSEQUENTLY, DID I ASK YOU TO
8 TAKE A LOOK INTO MR. AND MRS. BOEKEN'S INCOME FOR
9 THE YEARS, '98, '99, 2000?
10 A. YES, YOU DID.
11 Q. WERE YOU ABLE TO DO ALL OF THAT?
12 A. I WAS NOT ABLE TO DO ALL OF THAT OR
13 MOST -- OR A GOOD PORTION OF THAT.
14 Q. WERE YOU ABLE TO DO SOME OF THAT?
15 A. YES, I WAS.
16 Q. WHICH PORTION?

17 A. I STARTED WITH THE 1999 PORTION AND
18 THEN I SHIFTED MY ATTENTION TO THE 1998 PORTION.
19 Q. DID YOU GET A CHANCE TO GO THROUGH
20 THE 1998 PORTION SO THAT YOU GOT A PRETTY GOOD IDEA
21 OF HOW MUCH MONEY MR. AND MRS. BOEKEN MADE IN 1998?
22 A. I BELIEVE I DO.

23 Q. WHY WOULDN'T -- IF THE TAX RUSH WAS
24 GOING ON AND TAX SEASON WAS GOING ON, YOU ARE A
25 C.P.A., WHY WOULD YOU DO ME A FAVOR?
26 A. YOU ARE A CLIENT OF MINE. SOUNDED
27 LIKE AN INTERESTING ENGAGEMENT. AND I THOUGHT I
28 WOULD BE ABLE TO PARTICIPATE AND BENEFIT SOMEBODY.

3491

1 Q. OKAY. SO THE POINT I WAS TRYING TO
2 GET IS YOU ARE MY C.P.A.?

3 A. YES, I AM.

4 Q. AND MY LAW FIRM'S C.P.A.?

5 A. CORRECT.

6 Q. FOR ROUGHLY HOW LONG?

7 A. I THINK APPROXIMATELY THE MID-80'S,
8 SOMETIME, EARLY MID-80'S, '83, '84 WOULD BE MY
9 ESTIMATE.

10 Q. LET'S JUST CALL IT, FOR THE SAKE OF
11 ARGUMENT, 15 YEARS, IN ROUND NUMBERS. OVER THE
12 COURSE OF 15 YEARS, HOW MANY TIMES, ROUGHLY, HAVE I
13 COME TO YOU AND SAID, DO ME A FAVOR WITH ONE OF MY
14 CASES?

15 A. I THINK I CAN RECALL PERHAPS A
16 COUPLE OF TIMES PRIOR TO THIS ONE.

17 Q. SO THIS IS ABOUT TIME NUMBER 3 I
18 ASKED FOR A FAVOR?

19 A. THAT'S MY GUESSTIMATE, YES.

20 Q. TELL THE JURY WHAT A C.P.A. IS,
21 PLEASE.

22 A. A C.P.A. IS AN ACCOUNTANT WHO HAS
23 GRADUATED FROM A UNIVERSITY WITH CERTAIN ACCOUNTING
24 AND FINANCE COURSES COMPLETED, WHO HAS TAKEN A,
25 WHAT I BELIEVE IS A RIGOROUS TWO-DAY EXAMINATION OF
26 VARIOUS SUBJECTS AND HAS ACQUIRED TWO YEARS OF
27 EXPERIENCE IN CERTAIN FACETS OF THE ACCOUNTING
28 INDUSTRY AND THEN IS QUALIFIED OR REGISTERED WITHIN

3492

1 THE STATE OF CALIFORNIA TO CALL THEMSELVES A C.P.A.
2 AND TO HOLD THEMSELVES OUT TO THE PUBLIC AS SUCH.

3 Q. HOW LONG HAVE YOU BEEN A C.P.A.?

4 A. SINCE 1959.

5 Q. TELL THE JURY THE EDUCATIONAL
6 BACKGROUND THAT YOU HOLD IN ORDER TO BECOME A
7 C.P.A. IN YOUR SITUATION?

8 A. I AM A GRADUATE OF UCLA BUSINESS
9 SCHOOL, MAJORING IN FINANCE AND ACCOUNTING.

10 Q. WHICH YEAR DID YOU GET OUT?

11 A. IN 1957.

12 Q. TELL THE JURY YOUR OCCUPATIONAL
13 EXPERIENCE SINCE '57.

14 A. WELL, I STARTED OUT WORKING PART
15 TIME FOR A SOLO PRACTITIONER, WHO WAS MY FATHER,
16 C.P.A. AND THEN WHEN I GRADUATED COLLEGE I WENT TO
17 WORK FOR HIM FULL TIME FOR ABOUT A YEAR. THEN
18 AFTER THAT I CHANGED JOBS TO ANOTHER C.P.A., LARGER
19 C.P.A. FIRM TO GET A GREATER BREADTH OF EXPERIENCE
20 AND I WAS THERE FOR ONE YEAR AND THEN I WENT BACK
21 TO MY PREVIOUS EMPLOYER WHO HAD ENTERED INTO A

22 PARTNERSHIP WITH ANOTHER C.P.A.
23 I WAS AN EMPLOYEE THERE FOR ONE OR
24 TWO YEARS, AND THEN ULTIMATELY THEIR PARTNERSHIP
25 DISSOLVED AND I BECAME A PARTNER WITH MY EMPLOYER
26 ALONG WITH ANOTHER GENTLEMAN. AND THEN ULTIMATELY
27 THE OTHER GENTLEMAN LEFT AND THE PARTNERSHIP
28 CONSISTED OF MYSELF AND MY PREVIOUS EMPLOYER. AND
3493

1 ULTIMATELY THAT FIRM ADDED OTHER PARTNERS, OTHER
2 STAFF, AND WE GREW INTO A SUBSTANTIAL LOCAL FIRM IN
3 LOS ANGELES.

4 Q. AND ARE YOU A MEMBER OF THAT
5 SUBSTANTIAL LOCAL FIRM IN LOS ANGELES?

6 A. NOT PRESENTLY. I LEFT THAT FIRM.

7 Q. SO WHAT DOES A C.P.A. DO?

8 A. WELL, A C.P.A. WILL PREPARE
9 FINANCIAL STATEMENTS OF VARIOUS TYPES,
10 COMPILED, REVIEWS, AUDITED FINANCIAL
11 STATEMENTS.

12 HE WILL ACT AS AN INFORMAL
13 CONSULTANT TO MANY OF HIS CLIENTS IN FINANCIAL AND
14 BUSINESS MATTERS.

15 HE WILL PREPARE TAX RETURNS,
16 HE WILL DO TAX RESEARCH, HE WILL ASSIST A CLIENT IN
17 PLANNING EVENTS FROM A TAX STANDPOINT AND HE WILL
18 JUST WORK SIDE BY SIDE WITH HIS CLIENT TO HELP MAKE
19 HIS BUSINESS SUCCESSFUL AND PRESERVE THE ASSETS TO
20 THE BUSINESS, MAKE THEM GROW.

21 Q. IS THERE SUCH A THING AS A P.A. AS
22 OPPOSED TO A C.P.A.?

23 A. THERE WAS. I DON'T BELIEVE THERE
24 HAVE BEEN ANY P.A. LICENSES ISSUED FOR MANY, MANY
25 YEARS, BUT P.A. WAS A DESIGNATION FOR PUBLIC
26 ACCOUNTANT WHICH REQUIRED LESS RIGOROUS AND LESS
27 EDUCATION REQUIREMENT TO ENTER THE FIELD.

28 Q. WHO GIVES YOU THE C. IN C.P.A.?

3494

1 A. THE STATE OF CALIFORNIA, BOARD OF
2 ACCOUNTANCY.

3 Q. IS THAT THE LICENSE YOU HAVE HELD
4 SINCE '50?

5 A. YES, IT IS.

6 Q. NOW, WHAT KIND OF RECORDS WERE YOU
7 GIVEN, INITIALLY, BY MY FIRM, FOR MR. AND
8 MRS. BOEKEN?

9 A. I WAS GIVEN COPIES OF VARIOUS TAX
10 RETURNS FOR PRIOR YEARS PREPARED BY SOME OTHER TAX
11 PREPARERS AND THEN LATER I WAS DELIVERED A PACKAGE
12 OF OTHER MATERIALS.

13 Q. THE OTHER TAX PREPARERS WERE WHOM?

14 A. A GENTLEMAN BY THE NAME OF STANLEY
15 GORDON, P.A. AND A LADY BY THE NAME OF JOSEPHINE
16 TUBEROSI. AND I DON'T KNOW WHAT HER PROFESSIONAL
17 CREDENTIALS ARE.

18 Q. SO MR. GORDON HELD THE LESS
19 RIGOROUS LICENSE THAT ISN'T GIVEN ANYMORE?

20 A. CORRECT.

21 Q. AND MS. TUBEROSI, FROM WHAT YOU
22 HAVE SEEN, DOES SHE HOLD ANY LICENSE?

23 A. FROM WHAT I HAVE SEEN, I DO NOT
24 KNOW IF SHE HOLDS ANY LICENSE AT ALL.

25 Q. WHAT YEARS WERE THE TAX RETURNS
26 FOR?

27 A. I BELIEVE THE EARLIEST WAS 1988 AND
28 THEN I THINK WE WERE MISSING '91 -- '89, '90, '91.
3495

1 WE HAD '92 THROUGH '97 AND POSSIBLY A RETURN FOR
2 '98.

3 Q. WHY DO YOU SAY "POSSIBLY A RETURN
4 FOR '98"?

5 A. WELL, THERE SEEMED TO HAVE BEEN
6 SOME CONFUSION AS TO WHETHER THAT RETURN HAD BEEN
7 FINALIZED AND SIGNED AND FILED BY MR. AND
8 MRS. BOEKEN.

9 Q. PUTTING ASIDE '98, MOMENTARILY,
10 LET'S JUST TALK ABOUT TAX RETURNS FOR '98, EXCUSE
11 ME, '88, '92, '3, '4, '5, '6, '7, AND HERE'S WHAT I
12 WANT TO KNOW. WERE YOU GIVEN THE WHOLE TAX RETURN?

13 A. I WAS GIVEN THE TAX RETURNS, YES.

14 Q. YESTERDAY THERE WAS AN ECONOMIST
15 HERE WHO WAS GIVEN THE FIRST COUPLE OF PAGES OF TAX
16 RETURN AND SO TESTIFIED. AND I JUST WANT YOU TO
17 MAKE IT CLEAR TO THE JURY, YOU WERE GIVEN AN ENTIRE
18 TAX RETURN FOR EACH OF THOSE YEARS THAT I JUST
19 MENTIONED?

20 A. YES, I WAS, PRIOR TO 1998, EXCEPT
21 FOR THE MISSING YEARS.

22 Q. SO LET'S JUST GO TO 19 -- I AM
23 GOING TO GO BACKWARDS IN AWHILE, BUT LET'S GO TO
24 1998 TO START WITH. DID YOU HAVE SOMETHING THAT
25 LOOKED LIKE A FINAL TAX RETURN?

26 A. IT LOOKED LIKE A TAX RETURN. I HAD
27 SOME RESERVATIONS AS TO WHETHER IT WAS PROPERLY
28 PREPARED.

3496

1 Q. WHY?

2 A. THERE WAS JUST SOME INFORMATION ON
3 THERE AND I COULDN'T UNDERSTAND WHERE THE
4 INFORMATION MIGHT HAVE COME FROM OR WHAT THE
5 MEANING OF THE INFORMATION WAS.

6 Q. SINCE 1959, WHY DON'T YOU JUST, IN
7 ROUND NUMBERS, GIVE US AN IDEA OF HOW MUCH TAX
8 RETURNS YOU HAVE GOT A CHANCE TO LOOK AT?

9 A. INDIVIDUAL TAX RETURNS, I WOULD
10 SAY, PROBABLY, ON THE AVERAGE, AT LEAST OF 100 OR
11 MORE PER YEAR. WE ARE TALKING ABOUT -- PROBABLY
12 4,000 OR IN EXCESS OF 4,000 TAX RETURNS.

13 Q. THE TAX RETURN THAT YOU HAD FOR MR.
14 AND MRS. BOEKEN FOR 1998, I DON'T WANT TO GET
15 PERSONAL WITH ANYONE NOW, BUT IF YOU WERE GRADING
16 THE WAY IT WAS PUT TOGETHER, WOULD IT GET A HIGH
17 GRADE OR A MIDDLE GRADE OR A LOW GRADE?

18 A. IN MY OPINION, IT WOULD GET A LOW
19 GRADE.

20 Q. AND DID YOU INFORM ME OF THAT?

21 A. YES, I BELIEVE SO.

22 Q. A LITTLE EARLIER YOU MENTIONED THAT
23 THERE WAS SOME QUESTION ABOUT WHETHER OR NOT THAT
24 1998 RETURN HAD ACTUALLY BEEN FILED OR NOT.
25 EXPLAIN TO THE JURY WHAT YOU MEANT
26 BY THAT?

27 A. WHEN I ASKED MR. BOEKEN WHETHER IT
28 HAD BEEN FILED, HE SAID, YES, IT HAD. AND WHEN I
3497

1 ASKED --

2 MR. CARLTON: OBJECTION, HEARSAY.

3 MR. PIUZE: NOT FOR THE TRUTH OF THE
4 MATTER STATED, YOUR HONOR, JUST TO EXPLAIN THIS
5 DISCREPANCY. I WILL WALK AWAY FROM IT --
6 THE COURT: ALL RIGHT. I WILL ALLOW IT
7 AT THIS POINT, BUT I AM GOING TO MAYBE COMMENT ON
8 IT IN A SECOND. GO AHEAD.

9 Q BY MR. PIUZE: SO MR. --
10 THE WITNESS: COULD YOU GIVE ME THE
11 QUESTION AGAIN.

12 MR. PIUZE: SURE.

13 Q BY MR. PIUZE: YOU HAD PREVIOUSLY
14 SAID THERE WAS SOME QUESTION ABOUT WHETHER OR NOT
15 THE TAX RETURN FOR '98 HAD ACTUALLY BEEN FILED AND
16 I WAS ASKING YOU TO EXPLAIN TO THE JURY WHY YOU HAD
17 A QUESTION ABOUT THAT.

18 A. I HAD A QUESTION MARK BECAUSE

19 MR. BOEKEN HAD SAID IT WAS FILED AND YOU HAD SAID
20 THAT IT WAS NOT FILED, AND AT THAT POINT I HAD NOT
21 BEEN ABLE TO CONTACT THE TAXING AGENCIES FEDERAL
22 AND STATE AS TO WHETHER THOSE RETURNS HAD BEEN
23 FILED.

24 Q. HAVE YOU HAD A CHANCE NOW TO
25 CONTACT THE TAXING AGENCY, EITHER FEDERAL OR STATE,
26 TO FIND OUT WHETHER IT WAS FILED?

27 A. I DID CONTACT THE STATE AGENCY
28 WHICH IS A FRANCHISE TAX BOARD AND THEY INFORMED
3498

1 SOMEBODY ON MY STAFF, IT WAS NOT ME PERSONALLY,
2 THAT THE 1998 TAX RETURN HAD BEEN FILED FOR MR. AND
3 MRS. BOEKEN.

4 Q. SO RICHARD BOEKEN WAS RIGHT AND
5 MICHAEL PIUZE WAS WRONG?

6 A. IT APPEARS SO. BUT UNTIL I GET A
7 COPY OF THE RETURN, I ALWAYS REMAIN SKEPTICAL.

8 Q. WHY DO YOU SAY THAT?

9 A. JUST, I AM -- I HAVE TO SEE TO
10 BELIEVE.

11 Q. WHY DID YOU CHECK WITH THE
12 FRANCHISE TAX BOARD AS OPPOSED TO THE INTERNAL
13 REVENUE SERVICE?

14 A. THE INTERNAL REVENUE SERVICE WILL
15 NOT PROVIDE INFORMATION TO ANYBODY WHO IS NOT THE
16 TAXPAYER UNLESS THERE'S A SIGNED AND AUTHORIZED
17 POWER OF ATTORNEY ON FILE, WHEREAS THE FRANCHISE
18 TAX BOARD WILL PROVIDE THAT INFORMATION IF YOU
19 IDENTIFY YOURSELF AS A LEGITIMATE TAX PREPARER.

20 Q. THIS IS THE LAST QUESTION ON THIS
21 SERIES.

22 JUST AS A GENERAL PROPOSITION, IS
23 THE I.R.S. SOMETIMES TOUGHER TO DEAL WITH THAN THE
24 STATE AUTHORITIES?

25 A. I AM SORRY.

26 MR. CARLTON: OBJECTION, IRRELEVANT.

27 THE COURT: SUSTAINED.

28 Q BY MR. PIUZE: DIFFERENT ISSUE.

3499

1 DID YOU ASK FOR MORE INFORMATION
2 FROM MR. BOEKEN REGARDING HIS, OR FROM ME,
3 REGARDING HIS 1998 PAPERS, BOOKS, 1998 YEAR?

4 A. I DID.

5 Q. WHY?

6 A. WELL, I DIDN'T KNOW IF THE RECORDS
7 THAT I HAD WERE COMPLETE OR THERE WAS SOME

8 QUESTIONS ABOUT CERTAIN TRANSACTIONS.
9 Q. WHAT DID THAT 1998 TAX RETURN THAT
10 YOU WERE PROVIDED SAY, BOTTOM LINE?
11 A. BOTTOM LINE, IS IT SHOWED INCOME
12 FROM TWO OR THREE -- INCOME AND/OR LOSSES FROM TWO
13 OR THREE SOURCES AND I WAS NOT SURE WHAT THOSE
14 WERE.
15 Q. WAS THERE A NUMBER?
16 WHEN I SAY "BOTTOM LINE," I AM
17 GOING FOR A NUMBER.
18 A. WELL, THERE WERE NUMBERS FROM THOSE
19 TWO OR THREE SOURCES AND IN COMBINATION THEY ADDED
20 UP TO A NUMBER.
21 Q. WHAT?
22 A. I DON'T REMEMBER. I'D HAVE TO
23 REFER TO THE TAX RETURN.
24 Q. DO YOU HAVE IT?
25 A. I BELIEVE SO.
26 Q. YOU CAN TAKE A LOOK.
27 A. IT SHOWED A LINE WHICH IS CALLED
28 THE ADJUSTED GROSS INCOME, A TOTAL OF 34 AND A HALF
3500
1 THOUSAND DOLLARS, APPROXIMATELY.
2 Q. 34,000 BUCKS IS WHAT THE TAX RETURN
3 SHOWED THAT THE BOEKEN'S WOULD BE PAYING TAX?
4 A. NO, THAT'S ADJUSTED GROSS INCOME.
5 THE TAXABLE INCOME WAS ZERO BECAUSE THEY HAD
6 ITEMIZED DEDUCTIONS, SUCH AS MEDICAL CONTRIBUTIONS,
7 TAXES, MORTGAGE INTEREST, WHICH WOULD HAVE WIPED
8 OUT THE ADJUSTED -- BROUGHT THE ADJUSTED GROSS
9 INCOME DOWN TO A NEGATIVE TAXABLE INCOME FIGURE
10 WHICH WOULD HAVE PRODUCED NO INCOME TAX.
11 Q. SO ACCORDING TO THAT TAX RETURN,
12 THE BOEKEN'S OWED ZERO TAXES FOR 1998?
13 A. THAT'S WHAT THIS TAX RETURN SHOWS.
14 Q. AND WHAT IS IT, I DON'T WANT YOU TO
15 GET SUPER TECHNICAL WITH THIS, BUT WHAT IS IT ABOUT
16 THAT TAX RETURN THAT MADE YOU WANT TO DO OTHER
17 THINGS AND LOOK FURTHER?
18 A. WELL, ON PAGE ONE, THERE'S
19 SOMETHING LABELED N-O-L WHICH IS A NET OPERATING
20 LOSS OF \$37,000 AND I COULD NOT UNDERSTAND WHERE
21 THAT CAME FROM.
22 ON ANOTHER SCHEDULE WITHIN THE
23 RETURN, THERE WAS A COLUMN UNDER ROYALTIES RECEIVED
24 WITH A GROSS INCOME FIGURE AND A SUBTRACTION FROM
25 THAT FIGURE WHICH I DID NOT UNDERSTAND.
26 AND THEN THERE WAS ANOTHER COLUMN
27 HERE UNDER RENTS RECEIVED WITH A GROSS INCOME
28 FIGURE AND SOME EXPENSES WHICH PRODUCED A NET LOSS
3501
1 WHICH I DID NOT UNDERSTAND AS TO WHETHER THAT WAS A
2 SEPARATE ITEM OR AN ELEMENT OF THE FIRST COLUMN.
3 Q. IS THERE SOMEPLACE ON THAT TAX
4 RETURN THAT SHOWS WHEN IT WAS PREPARED?
5 A. NO, NOT ON THIS COPY.
6 Q. DO YOU KNOW WHEN THAT WAS PREPARED?
7 A. I DON'T.
8 Q. DO YOU KNOW WHEN THAT WAS FILED?
9 A. I DON'T.
10 Q. NOW, AS A RESULT OF LOOKING AT THAT
11 RETURN AND WHATEVER -- AND I SHOULD MAKE ONE OTHER
12 POINT TO THIS, LET'S STOP HERE FOR A SECOND.

13 HAD YOU SEEN RETURNS FOR PRIOR
14 YEARS?
15 A. YES, I HAVE.
16 Q. LET'S TALK ABOUT THOSE NOW AND I AM
17 GOING TO COME BACK TO 1998.
18 DID YOU SEE A TAX RETURN FOR 1988?
19 A. YES, I DID.
20 Q. WHAT WAS THE NET INCOME FOR 1988?
21 A. LET ME FIND THAT RETURN.
22 THIS WAS PREPARED BY SOMEBODY ELSE,
23 OTHER THAN THE TWO PEOPLE I MENTIONED BEFORE. IT
24 WAS A FIRM NAMED SILBEREICH & ASSOCIATES, INC. AND
25 THERE'S NO DESIGNATION HERE AS TO WHETHER THEY ARE
26 C.P.A.'S, P.A.'S OR WHO THEY ARE.
27 THEIR INVOICE DOESN'T EVEN TELL ME
28 WHO THEY ARE.
3502
1 WHAT WAS YOUR QUESTION?
2 Q. NET INCOME, 1988.
3 A. NET INCOME, 1988 IS \$86,000, SOME
4 OF IT COMING FROM INTEREST AND DIVIDENDS.
5 Q. OKAY. NET INCOME FROM BUSINESS,
6 1988?
7 A. \$82,322.
8 Q. AND THAT'S WHAT I AM GOING TO BE
9 INTERESTED IN AS I GO THROUGH HERE, IS NET INCOME
10 FROM BUSINESS.
11 SO IN OTHER WORDS IF THEY MADE SOME
12 MONEY ON INTEREST IN THEIR CHECKING ACCOUNT OR
13 SOMETHING LIKE THAT, I AM NOT INTERESTED?
14 A. OKAY, I UNDERSTAND.
15 Q. SO 1988, NET INCOME FROM BUSINESS
16 \$8 TO,000 AND CHANGE?
17 A. CORRECT.
18 Q. WHAT'S THE NEXT YEAR FOR WHICH YOU
19 HAVE A TAX RETURN?
20 A. 1992.
21 Q. NET INCOME FROM BUSINESS, 1992?
22 A. \$234,389.
23 Q. WHO PREPARED THAT?
24 A. JOSEPHINE TUBEROSI.
25 Q. 1993, NET INCOME?
26 A. WELL, I HAVE KNELT INCOME FROM
27 THREE DIFFERENT SOURCES.
28 Q. TELL US?
3503
1 A. ONE IS A W-2 FOR SALARY OF \$70,000.
2 LET ME SEE IF I CAN TELL WHO THAT CAME FROM. I
3 DON'T KNOW WHERE THAT CAME FROM, THERE'S NO COPY OF
4 THE W-2 AND NO IDENTIFICATION AS TO THE SOURCE.
5 Q. LET ME STOP YOU FOR A SECOND.
6 A. YES.
7 Q. DID YOU WRITE ME A SUMMARY LETTER
8 ON FEBRUARY 22, 2001?
9 A. YES, I DID.
10 Q. DO YOU HAVE THAT UP THERE
11 SOMEPLACE?
12 A. YES, I DO.
13 Q. DON'T PUT THOSE INCOME TAX FORMS
14 TOO FAR AWAY BUT I WOULD LIKE YOU TO HAVE THE
15 LETTER ALSO.
16 A. IT MIGHT BE EASIER FOR ME TO FIND
17 THAT IN THE COPY OF THE DEPOSITION.

18 Q. SURE.

19 A. I KNOW I HAVE IT IN HERE SOMEWHERE,
20 BUT I HAVE SEVERAL FILES AND I DON'T WANT TO WASTE
21 ANYBODY'S TIME.

22 Q. HERE, HERE'S ONE DEPOSITION.

23 A. OKAY, I HAVE THE LETTER HERE.

24 Q. ON 1993?

25 A. CORRECT.

26 Q. SALARY FROM WHERE?

27 A. ENEX RESOURCES.

28 Q. SPELL ENEX.

3504

1 A. I BELIEVE ITS E-N-E-X. BUT MY
2 LETTER SAID E-N-E-X-X, BUT I AM NOT SURE WHICH IS
3 CORRECT.

4 Q. ANYWAY, 1993, WHERE I AM GOING IS
5 THE NET INCOME AND YOU SAY IT'S BROKEN UP THREE
6 DIFFERENT WAYS.

7 SO THE FIRST IS A SALARY FROM ENEX
8 FOR 70,000?

9 A. CORRECT.

10 Q. SECOND?

11 A. OTHER INCOME FROM ENEX RESOURCES OF
12 \$18,135.

13 Q. THIRD?

14 A. SHORT-TERM CAPITAL GAIN FROM SOME
15 OIL INVESTMENTS OF \$149,000.

16 Q. WHAT'S A SHORT-TERM CAPITAL GAIN?

17 A. WELL, A SHORT-TERM CAPITAL GAIN IS
18 FROM AN INVESTMENT WHICH IS HELD FOR LESS THAN 12
19 MONTHS.

20 Q. SO FROM AN INVESTMENT, AN OIL
21 INVESTMENT THAT WAS HELD FOR LESS THAN 12 MONTHS,
22 MR. AND MRS. BOEKEN MADE \$149,000?

23 A. THAT'S WHAT THE TAX RETURN SHOWS.

24 Q. TOTAL, 1993, TOTAL BUSINESS INCOME?

25 A. \$237,135.

26 Q. 1994, NOW, I KNOW YOU HAVE GOT THE
27 LETTER IN FRONT OF YOU, BUT I WANT THE JURY JUST TO
28 BE SURE, YOU HAVE THE FULL TAX RETURN UP THERE FOR
3505

1 1994; RIGHT?

2 A. YES. YES, I DO.

3 Q. WHO SIGNED THE 1994 RETURN? WHAT

4 PREPARER PREPARED IT?

5 A. JOSEPHINE TUBEROSI.

6 Q. WAS THE '94 RETURN ALSO BROKEN DOWN
7 INTO SUBCOMPONENTS?

8 A. YES, IT WAS.

9 Q. WHAT?

10 A. WE HAVE A W-2 FOR SALARY FROM ENEX
11 RESOURCES OF \$70,000, OTHER INCOME FROM A JOINT
12 VENTURE OF \$85,000.

13 AND THE LONG-TERM CAPITAL GAIN FROM
14 OIL AND INVESTMENTS OF \$72,178.

15 Q. TOTAL?

16 A. TOTAL WAS \$227,178.

17 Q. SO LET'S STOP THERE FOR A MINUTE.

18 YOU JUST DEFINED SHORT-TERM CAPITAL
19 GAIN AS AN INVESTMENT HELD LESS THAN 12 MONTHS SO I
20 BET YOU LONG-TERM CAPITAL GAIN IS FOR AN INVESTMENT
21 HELD MORE THAN 12 MONTHS?

22 A. THAT IS CORRECT.

23 Q. BUT IN '93 AND '94, WHETHER IT
24 SHORT-TERM OR LONG-TERM, THESE WERE OIL
25 INVESTMENTS, IS THAT TRUE?
26 A. YES. YES, OIL, OIL PRODUCTS.
27 Q. 1995, WE HAVE HEARD THAT THERE WAS
28 A RETURN AND THEN AN AMENDED RETURN. CAN YOU
3506
1 VERIFY THAT.
2 A. I HAVE AN ORIGINAL RETURN AND I
3 HAVE AN AMENDED RETURN FOR 1995.
4 Q. AND YESTERDAY WE HEARD, I DON'T
5 WANT YOU TO USE ANY NUMBERS RIGHT NOW, BUT
6 YESTERDAY WE HEARD THAT THE ORIGINAL RETURN SHOWED
7 MORE INCOME THAN THE AMENDED RETURN?
8 A. CORRECT.
9 Q. I AM INTERESTED IN THE AMOUNT OF
10 THE AMENDED RETURN. HOW MUCH WAS THE INCOME FOR
11 1995 ON THE AMENDED RETURN?
12 A. ON THE AMENDED RETURN?
13 Q. YES.
14 A. \$250,000.
15 Q. WHAT WAS THE SOURCE OF THE INCOME
16 FOR THAT YEAR? WAS IT BROKEN DOWN INTO THREE AS
17 BEFORE OR NOT?
18 A. NO. THE SOURCE CAME FROM A W-2
19 FROM ENEX RESOURCES IN THE AMOUNT OF --
20 Q. WAIT. WAIT A SECOND.
21 BECAUSE WE HAVE SORT OF MADE AN
22 AGREEMENT WE ARE ONLY GOING TO USE THE AMENDED
23 RETURN.
24 A. UH-HUH.
25 Q. WAS THE SOURCE OF ALL OF THE INCOME
26 FROM ENEX?
27 A. YES, IT WAS.
28 Q. SO \$250,000, 1995?
3507
1 A. CORRECT.
2 Q. WHO PREPARED IT?
3 A. THE ORIGINAL RETURN AND THE AMENDED
4 RETURN WERE PREPARED BY STANLEY GORDON.
5 Q. 1996, YOU HAVE A TAX RETURN FOR
6 1996?
7 A. I DO.
8 Q. FULL RETURN?
9 A. FULL RETURN, YES.
10 Q. WHO PREPARED THAT?
11 A. STANLEY GORDON.
12 Q. WHAT WAS THE INCOME FOR THAT YEAR?
13 A. \$100,000.
14 Q. DOES THAT RETURN SHOW A SOURCE OF
15 THE \$100,000?
16 A. IT SHOWS THAT IT CAME FROM A W-2
17 BUT, I DO NOT HAVE A COPY OF THE W-2, SO I DO NOT
18 KNOW THE SOURCE.
19 Q. 1997, DO YOU HAVE A TAX RETURN FOR
20 1997?
21 A. I DO.
22 Q. WHAT WAS THE TOTAL INCOME, BUSINESS
23 INCOME?
24 A. FROM BUSINESS?
25 Q. YES.
26 A. \$205,271.
27 Q. WHO PREPARED THAT REPORT?

28 A. JOSEPHINE TUBEROSI.

3508

1 Q. WAS THE INCOME OF 205 BROKEN DOWN

2 INTO SUBCOMPONENTS?

3 A. IT WAS.

4 Q. WHAT?

5 A. IT SHOWS INCOME ON A SCHEDULE C,
6 WHICH IS A PROFIT OR LOSS FROM A BUSINESS AS A SOLE
7 PROPRIETORSHIP FROM A BUSINESS NAMED NOVA L.L.C.
8 SHOWING A PROFIT OF 230,077.

9 AND THEN THERE WAS A SECOND

10 SCHEDULE C FROM A BUSINESS NAMED NICHELSON
11 DEVELOPMENT WHICH SHOWED A LOSS OF \$24,806.

12 Q. TOTAL 205,271?

13 A. THE NET DIFFERENCE, YES, WAS
14 205,271.

15 Q. NOW, YESTERDAY PETER FORMUZIS WHO
16 IS AN ECONOMIST CAME IN AND WENT THROUGH THE SAME
17 YEARS, GAVE SLIGHTLY DIFFERENT NUMBERS.

18 ARE THE NUMBERS YOU ARE GIVING THE
19 BUSINESS INCOME AND NOT THE NET PERSONAL INCOME?

20 A. THOSE ARE, YES, THE BUSINESS INCOME
21 ONLY AND NOT INCLUDING ANY INVESTMENT INCOME FROM
22 SAVINGS INTEREST OR DIVIDENDS OR CAPITAL GAINS OR
23 LOSSES FROM THE SALE OF STOCKS OR ANY OTHER
24 SOURCES.

25 Q. SO EVERYTHING YOU HAVE JUST TOLD US
26 IS THE BUSINESS INCOME OF THE TAX RETURNS PREPARED
27 BY OTHER PEOPLE?

28 A. CORRECT.

3509

1 Q. HERE WE ARE TO 1998 AGAIN. AFTER
2 REVIEWING THE DOCUMENTS THAT I PROVIDED TO YOU, DID
3 YOU ASK FOR MORE DOCUMENTATION IN REGARD TO 1998?

4 A. I DON'T REMEMBER IF IT WAS
5 DOCUMENTATION AS MUCH AS IT WAS JUST ANSWERING
6 QUESTIONS AND TRYING TO CLARIFY CERTAIN
7 TRANSACTIONS.

8 Q. OKAY.

9 A. I DID ASK FOR MORE DOCUMENTATION,
10 YES.

11 Q. IT DOESN'T MATTER TO ME ONE WAY OR
12 ANOTHER.

13 A. YEAH, I AM REMEMBERING THAT I DID,
14 YES.

15 Q. DID YOU NEED CLARIFICATION?

16 A. I BELIEVED I NEEDED CLARIFICATION.

17 Q. NOW, I WANT TO REMIND YOU OF A
18 LITTLE BIT OF YOUR PAST TESTIMONY.

19 YOUR ORIGINAL ASSIGNMENT WAS '98,
20 '99 AND 2000. AND YOU HAVE ALREADY TOLD THE JURY
21 THAT YOU GOT UNDER WAY IN '99. WHAT HAPPENED, WHY
22 DID YOU STOP AT '99 AND GO TO '98?

23 A. I STOPPED BECAUSE YOU ASKED ME TO
24 AND SAID THAT '98 WAS A BIGGER PRIORITY FOR YOU AND
25 THE COURT, I BELIEVE.

26 Q. I DON'T WANT YOU TO QUOTE ME BACK
27 TO ME, NECESSARILY. YOU CAN IF YOU WANT. DID I
28 EXPRESS TO YOU THERE WAS SORT OF A SENSE OF URGENCY

3510

1 BECAUSE EVEN THOUGH IT WAS TAX SEASON, WE HAD A

2 TRIAL THAT WAS --

3 A. YES, YOU DID.

4 Q. OKAY. NOW, DID YOU SPEAK WITH

5 MR. BOEKEN ON OCCASION?

6 A. I SPOKE WITH MR. BOEKEN ON OCCASION

7 BY TELEPHONE AND I HAD TWO PERSONAL MEETINGS WITH
8 HIM IN MY OFFICE AS WELL.

9 Q. DID YOU SEEK CLARIFICATION FROM

10 MR. BOEKEN?

11 A. YES, I DID.

12 Q. DID YOU SEEK CLARIFICATION BOTH OUT
13 OF HIS MOUTH BY EXPLANATION AND ALSO BY DOCUMENT?

14 A. YES, I DID.

15 Q. GENERALLY, WITH WHAT KIND OF
16 RESULTS?

17 A. GENERALLY, WITH RESULTS THAT WERE
18 SOMEWHAT VAGUE OR CONFUSING. HIS MEMORY SEEMED TO
19 BE IMPAIRED. AND HE SEEMED TO BE JUST NOT ABLE TO
20 FOCUS OR CONCENTRATE WHEN I WOULD ASK HIM QUESTIONS
21 BY PHONE AND HE SAID HE WOULD CALL ME BACK, HE
22 DIDN'T CALL ME BACK.

23 HE MADE STATEMENTS TO ME THAT HE
24 HAD SPOKEN TO MISS TUBEROSI AND SHE HAD TOLD HIM
25 THAT SHE HAD DOCUMENTS AND SHE WAS GOING TO FAX
26 THOSE TO HIM AND HE WOULD FAX THEM TO ME. AND
27 NOTHING ARRIVED. AND ULTIMATELY I ASKED HIM IF I
28 COULD TALK TO MISS TUBEROSI DIRECTLY AND HE GAVE ME
3511

1 HER PHONE NUMBER AND WE DID HAVE A CONVERSATION AND
2 SHE HAD VERY LITTLE, I THINK. HER MATERIALS MAY
3 HAVE BEEN TURNED OVER TO HIM AT ONE POINT AND THEN
4 TURNED OVER TO ME.

5 Q. FROM -- WE HAVE HEARD LOTS OF
6 DOCTORS HERE, BUT YOU ARE NOT, YOU ARE A C.P.A.,
7 BUT YOU ARE A HUMAN BEING.
8 IN DEALING WITH MR. BOEKEN, WHAT
9 TIMEFRAME, OVER WHAT TIMEFRAME HAVE YOU BEEN
10 DEALING WITH HIM, FROM WHEN TO WHEN?

11 A. I BELIEVE IT WAS EARLY MARCH
12 THROUGH SOMETIME EARLY APRIL, OVER MAYBE FIVE- TO
13 SIX-WEEK PERIOD.

14 Q. EARLY MARCH 2001?

15 A. 2001, YES.

16 Q. TO EARLY APRIL 2001?

17 A. CORRECT.

18 Q. SO I AM NOT ASKING YOU ANY KIND OF
19 MEDICAL ANYTHING, OBVIOUSLY, JUST ONE HUMAN BEING
20 TALKING TO ANOTHER HUMAN BEING, DID YOU THINK HE
21 WAS CONFUSED?

22 MR. CARLTON: OBJECTION, RELEVANCE,
23 FOUNDATION.

24 THE COURT: FOR THE PURPOSES OF HIS WORK
25 ONLY.

26 ANSWER THE QUESTION.

27 THE WITNESS: HE SEEMED TO BE CONFUSED.

28 I MEAN, I ASKED HIM WHAT THESE CHECK STUBS WERE
3512

1 FROM, AND HE SAID, I DON'T KNOW, I DON'T REMEMBER.
2 I DIDN'T HAVE AN ACCOUNT AT THIS BANK, I HAD AN
3 ACCOUNT AT ANOTHER BANK.

4 I MEAN, ULTIMATELY IT TURNED OUT
5 THAT HE HAD ACCOUNTS AT BOTH BANKS AND THERE WAS A
6 PERSONAL ACCOUNT AND A BUSINESS ACCOUNT AND HE JUST
7 DID NOT SEEM TO RECALL THAT HE HAD THESE ACCOUNTS.

8 Q BY MR. PIUZE: SO LET'S KEEP IT

9 WITHIN THOSE PARAMETERS. AS FAR AS YOU ARE TRYING
10 TO LOOK AT THESE NUMBERS AND IN THESE BOOKS AND
11 THESE TAX RETURNS AND MAKE SOME SENSE OF THEM OVER
12 THE COURSE OF A FIVE-WEEK PERIOD, SIX-WEEK PERIOD,
13 THAT JUST ENDED, FROM MARCH OF 2001 TO APRIL 2001,
14 DID HE SEEM TO BE HAVING, TO YOU, MEMORY PROBLEMS?

15 A. YEAH, HE SEEMED TO BE HAVING MEMORY
16 PROBLEMS AND HE ALSO SAID SEVERAL TIMES WHEN I
17 TALKED TO HIM, I AM NOT -- I AM FEELING WEAK, YOU
18 KNOW, IT WAS LIKE IT WOULD BE A STRAIN FOR HIM TO
19 REALLY COME FORTH WITH THE INFORMATION, YOU KNOW,
20 AND OTHER THINGS WERE PROBABLY ON HIS MIND.

21 Q. OKAY.

22 DID YOU MEET -- ONE MORE QUESTION
23 ALONG THOSE LINES.

24 HAVE YOU BEEN DEALING WITH A
25 BUSINESS MAN, SMALL BUSINESS MEN, BUSINESS MEN AND
26 WOMEN WHO OWN THEIR OWN BUSINESSES OVER THE COURSE
27 OF 30 YEARS, WHATEVER, 40 YEARS?

28 A. 40 YEARS, YES. ONLY SMALL BUSINESS

3513

1 PEOPLE.

2 Q. AND FROM WHAT YOU HAVE SEEN OF

3 MR. BOEKEN DURING THE BRIEF PERIOD THAT YOU WORKED,
4 TRIED TO WORK WITH HIM HERE, RECENTLY, WAS HE UP TO
5 SNUFF AS FAR AS THE OVERWHELMING MAJORITY OF SMALL
6 BUSINESS PEOPLE YOU HAD EVER DEALT WITH?

7 MR. CARLTON: OBJECTION.

8 THE COURT: THIS, LADIES AND GENTLEMEN,
9 HE IS ANSWERING SOLELY WITH RESPECT TO HIM TRYING
10 TO GET INFORMATION, THAT SORT OF THING. HE IS NOT
11 AN EXPERT ON BUSINESS BEHAVIOR AND THAT SORT OF
12 THING AT THIS POINT.

13 YES, SIR.

14 THE WITNESS: HE APPEARED TO BE
15 DISORGANIZED BUT THERE ARE MANY SMALL BUSINESS
16 PEOPLE THAT ARE DISORGANIZED AND THAT'S WHY THEY
17 HIRE C.P.A.'S TO KEEP THEM ORGANIZED OR TO ORGANIZE
18 THEIR FINANCIAL AFFAIRS AND RECORDS.

19 Q BY MR. PIUZE: I WASN'T REALLY
20 GOING FOR THAT AS MUCH AS HIS MENTAL STATUS.

21 AGAIN, YOU ARE NOT A SHRINK, WE KNOW THAT. BUT
22 JUST IN DEALING WITH PEOPLE BACK AND FORTH, WHAT
23 KIND OF A GRADE WOULD YOU GIVE HIM?

24 MR. CARLTON: OBJECTION.

25 THE COURT: OKAY, THIS IS A RUNNING
26 OBJECTION. I THINK THE JURY UNDERSTANDS -- I WILL
27 TALK TO THEM ONE MORE TIME.

28 LADIES AND GENTLEMEN, YOU

3514

1 UNDERSTAND, THIS IS JUST IN THE RELATIONSHIP
2 BETWEEN THE ACCOUNTANT AND TRYING TO GET
3 INFORMATION FROM MR. BOEKEN.

4 PROCEED.

5 YOU REMEMBER THE QUESTION?

6 THE WITNESS: NO, WOULD YOU ASK ME THE
7 QUESTION AGAIN.

8 Q BY MR. PIUZE: SURE. IT WENT
9 SOMETHING LIKE THIS: YOU HAVE BEEN DEALING WITH
10 SMALL BUSINESS PEOPLE FOR 40 PLUS YEARS, ME BEING
11 ONE OF THEM, AND YOU HAD A CHANCE TO DEAL WITH
12 MR. BOEKEN, TRY TO HELP HIM OVER THE COURSE OF FIVE
13 OR SIX WEEKS, RECENTLY. AND I AM JUST ASKING YOU,

14 HOW MUCH WAS HE ABLE TO HELP YOU COMPARED TO MOST
15 PEOPLE, WHAT KIND OF A GRADE WOULD YOU GIVE HIM?
16 A. I WOULD GIVE HIM A FAIRLY LOW
17 GRADE. I HAVE HAD CLIENTS THAT HAVE BEEN AS
18 UNHELPFUL AS HE HAS BEEN AND CLIENTS THAT HAVE BEEN
19 EXTREMELY HELPFUL.
20 SO HE'S PROBABLY, ON THE LOWER END
21 OF THE SCALE IN TERMS OF HIS HELPFULNESS, AND I
22 ATTRIBUTED THAT TO -- I AM NOT A DOCTOR --
23 MR. CARLTON: OBJECTION, NO EXPERT
24 OPINION.
25 THE COURT: WELL, BUT HE HAS TO BE ABLE
26 TO ANSWER THIS QUESTION, TO SET IT IN CONTEXT ONLY.
27 AGAIN, THE JURY UNDERSTANDS HE'S
28 NOT A MEDICAL DOCTOR.

3515

1 MR. PIUZE: GO AHEAD, FINISH IT, PLEASE.
2 THE COURT: WHAT IS YOUR SENSE OF IT,
3 SIR?
4 THE WITNESS: MY SENSE OF IT WAS THAT HE
5 WAS UNDER A GREAT DEAL OF, YOU KNOW, PHYSICAL PAIN
6 OR CONCERN WITH HIS MEDICAL CONDITION AND DIDN'T
7 HAVE A LOT OF PATIENCE TO DEAL WITH THESE THINGS.
8 THE COURT: THANK YOU.

9 THE WITNESS: HE WAS RELYING UPON ME TO
10 DO THE DETECTIVE WORK AND TO NOT BURDEN HIM ANY
11 MORE THAN NECESSARY.

12 MR. PIUZE: THANKS.

13 Q BY MR. PIUZE: HOW MANY TIMES DID
14 YOU ACTUALLY MEET, FACE-TO-FACE, WITH HIM?

15 A. TWICE.

16 Q. WHERE?

17 A. IN MY OFFICE.

18 Q. WHY?

19 A. WELL, I BROUGHT HIM IN THE FIRST
20 TIME TO GIVE HIM RECORDS AND ASKED HIM -- WELL, I
21 HAD TO DEVELOP AN UNDERSTANDING OF HIS BUSINESS
22 ACTIVITIES BECAUSE READING THE TAX RETURNS WAS NOT
23 GIVING ME THAT UNDERSTANDING. SO I ASKED QUESTIONS
24 SO I WOULD KNOW EXACTLY WHAT HE WAS DOING, WHO
25 THESE COMPANIES WERE AND TO GIVE HIM A SET OF
26 RECORDS TO TAKE BACK TO HIS HOME AND IDENTIFY FOR
27 ME WHETHER, WHAT THE ITEMS WERE, WERE THEY INCOME,
28 IF THEY WERE CHECKS, WERE THEY BUSINESS CHECKS,

3516

1 PERSONAL CHECKS, WHAT TYPE OF BUSINESS CHECKS, AND
2 HE RETURNED -- HE DID THAT AND THEN HE RETURNED IT
3 TO MY OFFICE. AND THEN THE SECOND TIME I BROUGHT
4 HIM IN TO ASK HIM SOME QUESTIONS TO TRY TO CLARIFY
5 SOME DOUBTS OR SOME BIG GAPS THAT I HAD.

6 Q. OKAY.

7 DID YOU ASK HIM TO BRING DOCUMENTS
8 WITH HIM?

9 A. I DID ASK HIM TO EITHER BRING OR
10 FAX DOCUMENTS TO ME.

11 I ASKED HIM FOR SPECIMEN AGREEMENTS
12 BETWEEN HIMSELF AND OTHER PARTIES TO HELP ME
13 UNDERSTAND BETTER WHAT HIS BUSINESS OPERATION WAS
14 ALL ABOUT.

15 Q. DID YOU TRY TO LIMIT THE SCOPE AND
16 THE AMOUNT OF DOCUMENTS THAT HE SHOWED TO YOU?

17 A. YES, I TRIED TO LIMIT THE SCOPE.

18 Q. WHY?

19 A. I WAS LOOKING FOR THINGS THAT MIGHT
20 BE RELEVANT, AND I DIDN'T WANT PILES OF PAPERS THAT
21 WOULD BE IRRELEVANT. AND I ASKED HIM SPECIFICALLY
22 FOR CERTAIN TYPES OF DOCUMENTS OR SAMPLES OF THOSE
23 DOCUMENTS AND WHAT HE PROVIDED ME WERE SAMPLES.

24 Q. DID HE PROVIDE WITH YOU RELATIVELY
25 MORE THAN YOU WANTED?

26 A. YES, IN ONE INSTANCE HE DID.

27 Q. EXPLAIN.

28 A. WELL, HE BROUGHT ME A BOX FULL OF

3517

1 FOLDERS WHICH CONTAINED MANY UNPAID BILLS, MEDICAL
2 BILLS, OTHER VENDOR BILLS, THINGS WHICH I DIDN'T
3 FEEL IT WOULD BE NECESSARY FOR ME TO GET INTO
4 BECAUSE IT WOULD JUST CREATE AN UNDUE BURDEN AND
5 UNNECESSARY AMOUNT OF TIME TO EXAMINE INFORMATION
6 THAT I THOUGHT WOULD BE USELESS.

7 Q. SO DURING YOUR BUSY SEASON, JUST
8 BEFORE THE APRIL 15TH TAX DEADLINE, AS A C.P.A.,
9 AFTER YOU ASKED MR. BOEKEN TO BRING IN A LIMITED
10 AMOUNT OF STUFF BECAUSE YOU HAD A LIMITED AMOUNT OF
11 TIME, DID HE BRING YOU A WHOLE BUNCH OF JUNK?

12 A. WELL, HE BROUGHT ME ONE BOX THAT
13 CONSTITUTED WHAT I THOUGHT WAS JUNK. AND ANOTHER
14 LARGE CARTON THAT WAS LABELED 2000 WHICH I THINK
15 ARE HIS RECORDS FOR 2000 WHICH I WASN'T PREPARED TO
16 GET INVOLVED WITH UNTIL I COULD FINISH UP THE PRIOR
17 TWO YEARS.

18 Q. THANKS.

19 IN PERSON, WHEN HE WAS THERE IN
20 PERSON, TALKING TO YOU, DID YOU HAVE ANY DIFFERENT
21 TAKE ABOUT HIM AND HIS ABILITIES THAN YOU HAVE
22 ALREADY TOLD THE JURY?

23 A. WELL, HE MUST HAVE BEEN A FAIRLY
24 ASTUTE MAN IN THE OIL AND GAS BUSINESS OR FAIRLY
25 SUCCESSFUL BUSINESS MAN IN HIS CHOSEN FIELD TO HAVE
26 CREATED A BUSINESS WHICH IS RELATIVELY SUCCESSFUL.
27 BUT HE SEEMED TO BE PRETTY -- PRETTY OUT OF IT AT
28 THE TIME THAT I SAW HIM.

3518

1 Q. ALL RIGHT.

2 SO OUT OF THE YEARS, '98, '99,
3 2000, HOW MUCH DID YOU ACCOMPLISH?

4 A. I PREPARED A SET OF RECORDS FOR '98
5 WHICH I THOUGHT WOULD BE SUITABLE FOR THE ULTIMATE
6 PREPARATION OF TAX RETURNS FOR 1998, NOT KNOWING
7 WHETHER RETURNS HAD BEEN PREPARED OR WHICH ONES HAD
8 BEEN FILED AND A, ALMOST COMPLETE SET OF RECORDS
9 FOR 1999 WITH SOME OPEN ITEMS THAT I HAVE NOT YET
10 HAD A CHANCE TO REVIEW WITH HIM. AGAIN, TOWARDS
11 PREPARING A SET OF 1999 TAX RETURNS FOR HIM.

12 Q. IS THE ONE YEAR THAT YOU COMPLETED

13 '98?

14 A. I HAVE COMPLETED A PORTION OF THE
15 RECORDS FOR '98, WHAT I CONSIDER THE MOST IMPORTANT
16 PORTION.

17 Q. AND DO YOU CONSIDER THAT YOUR WORK
18 IS PRETTY ACCURATE?

19 A. IT'S PRETTY ACCURATE. I MEAN, YOU
20 KNOW, WE ARE NOT SCIENTISTS, WE ARE ACCOUNTANTS.
21 IF I MAY USE A CLICHE' HERE, ACCOUNTING IS AN ART
22 AND NOT A SCIENCE. SO YOU KNOW, YOU WILL HAVE
23 ACCOUNTANTS WHO WILL TAKE ISSUE WITH THE WAY

24 CERTAIN THINGS ARE DONE AND THERE IS A CERTAIN
25 AMOUNT OF LATITUDE AND A CERTAIN AMOUNT OF GRAYNESS
26 IN THE PERFORMANCE OF DUTIES AS AN ACCOUNTANT.
27 Q. WHAT WAS THAT WORD, GRAYNESS?
28 A. GRAY, GRAY AREAS.

3519

1 Q. OH, GRAY?
2 A. HOW YOU TREAT CERTAIN THINGS.
3 Q. GOT IT.
4 WHAT NUMBER DID YOU COME UP WITH
5 FOR THE BUSINESS INCOME FOR 1998?
6 A. WELL, FROM MEMORY, I BELIEVE IT WAS
7 ABOUT \$167,000. CAN I CHECK THAT.
8 Q. SURE CAN.
9 A. IT'S IN MY DEPOSITION, BUT IT MIGHT
10 BE EASIER FOR ME TO FIND HERE.
11 A LITTLE OVER \$167,000.
12 Q. WHY DON'T YOU TELL THE JURY JUST
13 THE EXACT NUMBER.
14 A. \$167,193.

15 Q. SO MR. BOEKEN WENT FROM HAVING A
16 NET TAXABLE INCOME THAT MS. TUBEROSI PREPARED FOR
17 HIM OF MINUS 90, LESS THAN ZERO?
18 A. WELL, TAXABLE INCOME AND GROSS
19 INCOME ARE TWO DIFFERENT THINGS. I MEAN, TO
20 COMPARE THIS NUMBER TO WHAT SHE HAD ON THE RETURN,
21 FOR 1998, THE BUSINESS INCOME, I BELIEVE, WAS
22 \$70,000 AND MY RECORDS SHOW DOZEN 167,000.

23 Q. ALL RIGHT. WELL, THAT'S WHERE I
24 WANT TO BE.
25 THERE'S \$100,000, THAT'S A LOT OF
26 MONEY. THAT'S \$100,000 THAT SHE DIDN'T HAVE THAT
27 YOU DO HAVE AND WE HAVE GOT 18 SKEPTICAL JURORS.
28 TELL THEM HOW YOU CAME UPON YOUR NUMBER, PLEASE.

3520

1 A. I TOOK THE BANK RECORDS FOR THE
2 YEAR 1998 AND ENTERED THE BANK DEPOSIT AS INCOME.
3 MR. BROKEN HAD SAID THAT ALL HIS BANK DEPOSITS TO
4 THAT ACCOUNT WERE INCOME, AND I TOOK THE CHECKS OR
5 COPIES OF THE CHECKS AND EXAMINED OR LOOKED AT EACH
6 ONE AND MADE A DETERMINATION AS TO WHAT WAS A
7 BUSINESS EXPENSE AND WHAT WAS A PERSONAL EXPENSE.
8 AND THEN AT THE END OF THE PROCESS ASKED MR. BOEKEN
9 IF OUR CLASSIFICATION WAS CORRECT.

10 AND HE CLARIFIED A FEW QUESTIONS
11 AND WE MADE SOME CHANGES, AND AFTER COMPLETING THAT
12 PROCESS, I CAME UP WITH WHAT I CALL A PROFIT AND
13 LOSS STATEMENT. THIS WAS DONE ON A SOFTWARE SYSTEM
14 COMMONLY USED CALLED QUICK BOOKS WHICH PRODUCES A
15 VERY SIMPLE SET OF RECORDS FOR A SMALL BUSINESS.
16 MANY SMALL BUSINESSES USE THIS PARTICULAR SYSTEM.

17 Q. WHY WOULD YOU HAVE TO BE MAKING A
18 DETERMINATION AS TO WHAT WAS PERSONAL EXPENSE
19 VERSUS WHAT WAS BUSINESS EXPENSE?
20 A. WELL, THE BUSINESS EXPENSES ARE
21 DEDUCTIBLE IN ARRIVING AT NET BUSINESS INCOME. THE
22 PERSONAL EXPENSES ARE NOT.
23 Q. DOES THAT MEAN THAT SOME OF THE
24 BOEKEN FAMILY'S PERSONAL EXPENSES WERE BEING
25 WRITTEN OUT OF THE SAME ACCOUNT AS THE BUSINESS
26 EXPENSES?

27 A. YES, THEY WERE.
28 Q. DO YOU LIKE THAT?

3521

1 A. WELL, I DON'T ENCOURAGE THAT
2 PRACTICE. BUT IT'S -- IT'S COMMON FOR SMALL, SMALL
3 BUSINESSES TO BE DISORGANIZED THIS WAY.

4 Q. YOU WOULDN'T LET THAT HAPPEN TO ME,
5 WOULD YOU?

6 A. I WOULD RECOMMEND AGAINST IT. I
7 MEAN, I CAN'T BREAK YOUR ARM TO STOP YOU.
8 THE COURT: BUT LET'S REMOVE THE ME'S OUT
9 OF THERE. LET'S REMOVE OURSELVES.

10 MR. PIUZE: YES, SIR, YOU KNOW WHAT, IF
11 WE CAN, WHY DON'T I TAKE THE LAST QUESTION BACK.
12 THE COURT: GOOD.

13 LADIES AND GENTLEMEN, JUST
14 DISREGARD THE LAST QUESTION AND THE ANSWER, PLEASE.

15 Q BY MR. PIUZE: IF YOU ARE GIVING
16 PROFESSIONAL TAX ADVICE TO YOUR SMALL BUSINESS
17 CLIENTS, YOU WOULDN'T ADVISE THAT THEY DO THAT
18 IN ORDER TO SATISFY YOU, WOULD THAT BE A GOOD WAY
19 OF PUTTING IT?

20 A. WELL, I WOULD RECOMMEND THAT THEY
21 TRANSFER, ON A REGULAR BASIS, A CERTAIN SUM OUT OF
22 THAT BUSINESS TO A PERSONAL BANK ACCOUNT AND THEY
23 PAY THEIR PERSONAL BILLS OUT OF THAT BANK ACCOUNT.
24 IT REDUCES CONFUSION AND REDUCES
25 THE AMOUNT OF ACCOUNTING WORK THAT I HAVE TO DO.

26 Q. HAVING HEARD THAT THAT'S YOUR
27 RECOMMENDATION, DO YOU STILL WANT TO STICK WITH THE
28 FACT THAT IT'S IMPORTANT FOR SMALL BUSINESS MEN TO
3522

1 DO IT JUST THIS WAY THAT MR. BOEKEN DID?
2 A. IT'S COMMON, SOME OF THEM, WHEN YOU
3 TELL THEM WHAT THEY SHOULD BE DOING WILL ACCEPT
4 YOUR SUGGESTIONS AND OTHERS WILL NOT. THEY JUST
5 WILL CONTINUE THE SAME PRACTICE.

6 Q. OKAY. SO, ARE YOU GOING TO PREPARE
7 AN AMENDED TAX RETURN FOR MR. AND MRS. BOEKEN FOR
8 1998?

9 A. I BELIEVE I WILL. I HAVE TO OBTAIN
10 COPIES OF WHAT THE ORIGINAL RETURNS LOOKED LIKE AND
11 DETERMINE THE DIFFERENCES AND THEN PREPARE AN
12 AMENDED, IF NECESSARY AND MY -- I MEAN, MY INITIAL
13 IMPULSE IS IT LOOKS LIKE THAT THERE WILL HAVE TO BE
14 AN AMENDED RETURN.

15 Q. NOW, FOR REASONABLE ACCOUNTING
16 PROBABILITY, THE WAY YOU DO BUSINESS, GOT NOTHING
17 TO DO WITH THREE TIMES -- HOW MANY TIMES HAVE YOU
18 EVER BEEN IN A COURTROOM?

19 A. YOU ARE ASKING ME TO GO BACK A LONG
20 TIME.

21 YOU KNOW, IN COURT OR IN
22 COURT-RELATED TYPE PROCEEDINGS, PROBABLY ABOUT A
23 HALF DOZEN OVER THE COURSE OF MY CAREER.

24 Q. PUTTING ASIDE HALF A DOZEN TIMES OR
25 TAKING INTO ACCOUNT A HALF DOZEN TIMES OVER 40
26 SOMETHING YEARS, BUT ALSO TAKING INTO ACCOUNT THE
27 OTHER 99 PERCENT OF YOUR TIME WHEN YOU GOT NOTHING
28 TO DO WITH LITIGATION, FOR REASONABLE C.P.A.

3523

1 PROBABILITY, DO YOU THINK THAT THE BUSINESS INCOME
2 WAS ABOUT \$17,000?

3 A. THAT'S MY IMPRESSION AT THIS POINT
4 WITH THE INFORMATION THAT I HAVE PRESENTED TO ME,

5 YES.

6 Q. AND YOU KNOW I DON'T WANT TO PUFF
7 THIS, WHAT WAS THE EXACT NUMBER AGAIN, TELL US
8 AGAIN.

9 A. \$167,193.

10 Q. NOW, WERE THERE A COUPLE OF
11 OCCASIONS WHEN YOU LOOKED THROUGH SOME OF THOSE
12 RECORDS, THE INCOME, WHETHER IT BE W-2'S OR
13 OTHERWISE, SOME OF IT WAS SLOTTED FOR RICHARD
14 BOEKEN AND SOME OF IT WAS SLOTTED FOR JUDY BOEKEN?
15 A. I BELIEVE IN 1997, THERE WAS A TAX
16 RETURN PREPARED FOR NOVA L.L.C., WHICH IS A LIMITED
17 LIABILITY COMPANY, AND A LIMITED LIABILITY COMPANY
18 IS A FORM OF ORGANIZATION IN CALIFORNIA WHICH IS
19 SIMILAR TO A PARTNERSHIP IN SOME WAYS AND SIMILAR
20 TO A CORPORATION IN SOME WAYS. BUT FROM A TAX
21 STANDPOINT, IT IS SIMILAR TO A PARTNERSHIP AND EACH
22 OWNER IS GIVEN WHAT IS CALLED A FORM K-1, WHICH
23 ALLOCATES TO THEM THEIR SHARE OF INCOME, PROFIT,
24 LOSS, DEDUCTIONS, CREDITS, SO -- AND BASED UPON
25 THEIR RELATIVE OWNERSHIP IN THE LIMITED LIABILITY
26 COMPANY.

27 Q. SO IN SOME OF THESE INSTANCES, DID
28 THE PARTNERSHIP -- IS IT A PARTNERSHIP --
3524

1 A. IT FILES A PARTNERSHIP INCOME TAX
2 RETURN TO THE U.S. GOVERNMENT.

3 Q. SO THESE K-1'S, SOME OF THE MONEY
4 WENT TO JUDY BOEKEN, SOME OF THE MONEY WENT TO
5 RICHARD BOEKEN?

6 A. FROM 1997 IT WAS ALLOCATED 50
7 PERCENT TO EACH OF THEM.

8 Q. DID THAT MAKE ANY DIFFERENCE TO YOU
9 AS TO DETERMINING THE BUSINESS INCOME?

10 A. NO.

11 Q. '97 WASN'T THE YEAR THAT YOU
12 PREPARED THE FORM?

13 A. THAT IS CORRECT.

14 MR. PIUZE: I GOT NO FURTHER QUESTIONS.

15 THANK YOU.

16 THE COURT: ALL RIGHT.

17 CROSS-EXAMINATION.

18 MR. CARLTON: THANK YOU, YOUR HONOR.

19 THE COURT: YES, SIR.

20

21 CROSS-EXAMINATION

22

23 BY MR. CARLTON:

24 Q. HELLO, MR. LEWAK.

25 A. HELLO.

26 Q. LET'S SEE. YOU HAVE BEEN PROVIDED
27 A BUNCH OF DOCUMENTS THAT APPEAR TO BE TAX RETURNS
28 BY MR. PIUZE'S OFFICE; RIGHT?

3525

1 A. CORRECT.

2 Q. AND HOW MANY OF THOSE TAX RETURNS
3 HAVE YOU DISCUSSED WITH MR. BOEKEN HIMSELF?

4 A. I DON'T BELIEVE I HAVE DISCUSSED

5 ANY OTHER THAN THE 1998 RETURN.

6 Q. OKAY. AND THAT ONE HE TOLD YOU HE

7 FILED?

8 A. HE TOLD ME HE FILED, HE BELIEVED HE
9 HAD FILED A RETURN, CORRECT.

10 Q. AND YOUR OFFICE HAS CONFIRMED WITH
11 THE FRANCHISE TAX BOARD, AT LEAST, THAT IT WAS
12 FILED?
13 A. THAT IS CORRECT.
14 Q. SO YOU HAVE BEEN ASKED NOW BY MR.
15 PIUZE TO GO BACK OVER THE 1998 AND TO LOOK AT IT
16 AGAIN FOR PURPOSES OF THIS LITIGATION?
17 A. FOR PURPOSES OF THE LITIGATION AND
18 ALSO TO REFILE OR FILE A TAX RETURN, IF IT HAD NOT
19 BEEN FILED. AT THE TIME WE DIDN'T KNOW WHETHER IT
20 WAS FILED.

21 Q. THAT WAS WHAT MR. PIUZE ASKED YOU
22 TO DO?

23 A. CORRECT.

24 Q. AND HE TOLD YOU THERE WAS AN
25 URGENCY, YOU HAD TO DO THIS BECAUSE THIS CASE WAS
26 MOVING ALONG AND YOU HAD TO COME TESTIFY?

27 A. THAT IS CORRECT.

28 Q. ALL RIGHT. NOW, LOOKING OR JUST

3526

1 DIRECTING YOUR ATTENTION TO THE EARLIER RETURNS,
2 LET'S SEE, I THINK YOU SAID 1988, YOU SAW A COPY OF
3 A 1988 RETURN AND THEN '92 THROUGH '97; RIGHT?

4 A. THAT IS CORRECT.

5 Q. BUT YOU DON'T KNOW WHETHER ANY OF
6 THOSE RETURNS HAVE BEEN FILED WITH ANY OF THE
7 TAXING AUTHORITIES, DO YOU?

8 A. WELL, I BELIEVE I KNOW THAT ONE
9 RETURN WAS FILED BECAUSE I FOUND CANCELED CHECKS IN
10 PAYMENTS OF THE LIABILITY TO THE FEDERAL AND STATE
11 GOVERNMENTS ON THOSE TAX RETURNS.

12 Q. WHICH YEAR WAS THAT?

13 A. I THINK IT WAS 1995.

14 Q. OKAY. YOU HAVE SEEN NO EVIDENCE
15 THAT ANY OF THE OTHER ONES WERE ACTUALLY FILED,
16 THOUGH, HAVE YOU? OTHER THAN --

17 A. I BELIEVE 1997 WAS FILED BECAUSE WE
18 CHECKED WITH THE FRANCHISE TAX BOARD AND THEY TOLD
19 US THAT 1997 WAS FILED. LET ME DOUBLE CHECK THAT.
20 YES, FRANCHISE TAX BOARD SAID THE
21 1997 RETURN WAS FILED, 1998 RETURN WAS FILED, ALONG
22 WITH SOME OF THE OTHER ENTITIES.

23 Q. SOME OF THE OTHER ENTITIES?

24 A. WELL, NOVA L.L.C. AND THE COMPANY
25 CALLED NOVA PINION.

26 SO THEY CONFIRMED THAT A COUPLE OF
27 THE PERSONAL RETURNS, I DID NOT INQUIRE AS TO THE
28 1996 OR PRIOR RETURNS WHETHER THOSE HAD BEEN FILED.

3527

1 Q. OKAY. SO WE ARE TALKING '98, '92,
2 '93, '94 AND '96. YOU DON'T KNOW WHETHER THEY WERE
3 FILED?

4 A. I DO NOT KNOW WHETHER THEY WERE
5 FILED.

6 Q. AND YOU DID JUST TESTIFY THAT YOU
7 ALWAYS REMAIN SKEPTICAL UNTIL YOU GET A COPY OF THE
8 RETURN; RIGHT?

9 A. WELL, I HAVE COPIES OF THE RETURNS.

10 I REMAIN SKEPTICAL IN TERMS OF WHAT THE FRANCHISE
11 TAX BOARD HAS TOLD ME UNTIL I WILL GET COPIES OF
12 THE RETURNS FROM THE FRANCHISE TAX BOARD AND THE
13 INTERNAL REVENUE SERVICE.

14 Q. ALL RIGHT.

15 AND YOU HAVE GOTTEN NONE OF THOSE
16 COPIES FROM --
17 A. I HAVE NOT HAD THE OPPORTUNITY.
18 IT'S A SLOW BUREAUCRATIC PROCESS.
19 Q. OKAY.
20 NOW, I THINK YOU ALSO SAID, THOUGH,
21 THAT A TAX PAYER COULD GO TO THE I.R.S. AND GET A
22 COPY OF HIS RETURN; RIGHT?
23 A. CORRECT.
24 Q. AND SOMEONE ELSE ON THE TAX PAYERS
25 BEHALF COULD, IF THEY HAD A WRITTEN POWER OF
26 ATTORNEY?
27 A. CORRECT.
28 Q. SO LET'S RETURN TO 1998. NOW, THE
3528
1 TUBEROSI RETURN LISTED INCOME OF \$34,588; RIGHT?
2 A. THAT IS CORRECT, ADJUSTED GROSS
3 INCOME.
4 Q. ADJUSTED GROSS INCOME, NO TAX.
5 AND YOU, IN GOING BACK OVER THIS,
6 COME TO A HIGHER NUMBER, \$167,000 AND SOME CHANGE?
7 A. WELL, I COME TO A HIGHER NUMBER FOR
8 A COMPONENT OF THIS TAX RETURN. THERE'S A COUPLE
9 OF OTHER COMPONENTS IN HERE WHICH I HAVEN'T HAD A
10 CHANCE TO DETERMINE WHERE THEY CAME FROM AND
11 WHETHER THEY ARE LEGITIMATELY INCLUDED IN THIS TAX
12 RETURN.
13 Q. FOR BUSINESS INCOME?
14 A. FOR BUSINESS INCOME.
15 Q. YOU COME TO A HIGHER NUMBER?
16 A. YES.
17 Q. AND -- OKAY, LET'S CLARIFY.
18 YOU HAVE TALKED TO MR. BOEKEN, YOU
19 HAVE LOOKED AT THESE OTHER DOCUMENTS.
20 WHERE DOES HE GET HIS BUSINESS
21 INCOME FOR 1998?
22 A. HE GETS HIS BUSINESS INCOME FROM
23 INVESTORS WHO PURCHASE A, WHAT IS CALLED, A WORKING
24 INTEREST IN OIL AND GAS PROJECTS.
25 Q. AND DO YOU KNOW WHAT THAT IS?
26 A. WELL, I BELIEVE THAT WHEN THE OIL
27 AND GAS IS SOLD, AND THERE ARE ROYALTIES PAID TO
28 THE PARTICIPANTS, OR A PORTION OF THE MONEY FROM
3529
1 THE SALE OF THE OIL AND GAS IS PAID TO THE
2 CO-OWNERS AS ROYALTY INCOME.
3 Q. BUT YOU DON'T KNOW SPECIFICALLY?
4 A. WELL, I KNOW A LITTLE BIT ABOUT THE
5 OIL AND GAS BUSINESS BECAUSE I HAVE DONE TAX
6 RETURNS FOR PEOPLE IN THE OIL AND GAS INDUSTRY.
7 Q. JUST TO TAKE THIS YEAR, MR. BOEKEN
8 GETS HIS BUSINESS INCOME FROM NOVA L.L.C.; RIGHT?
9 A. NOVA L.L.C. IS HIS OPERATING ENTITY
10 FOR THE OPERATION OF HIS OIL AND GAS BUSINESS
11 ACTIVITIES.
12 Q. AND YOUR DISCUSSIONS WITH
13 MR. BOEKEN, DID YOU LEARN OF ANY OTHER SOURCE OF
14 INCOME FOR HIM, OTHER THAN JUST PASSIVE INVESTMENT
15 INCOME?
16 A. I AM SORRY, SAY THAT AGAIN.
17 Q. IN YOUR DISCUSSIONS WITH
18 MR. BOEKEN, IN LOOKING AT THE DOCUMENTS THAT YOU
19 HAVE SEEN, DO YOU KNOW OF ANY OTHER SOURCE OF

20 INCOME FOR MR. BOEKEN DURING 1998 OTHER THAN
21 PASSIVE INVESTMENT INCOME?
22 MR. PIUZE: I AM GOING TO OBJECT.
23 THE WITNESS: I DON'T THINK IT'S PASSIVE.
24 MR. PIUZE: EXCUSE ME. THAT WAS THE
25 OBJECTION I WAS GOING TO MAKE, IS I DON'T THINK HE
26 HAS ESTABLISHED THAT'S PASSIVE INCOME AT ALL.
27 MR. CARLTON: I AM SORRY. I AM NOT
28 TRYING TO ESTABLISH THAT THAT IS PASSIVE INCOME.
3530

1 THE COURT: HE IS JUST ASKING ABOUT OTHER
2 SOURCES OF INCOME. THAT'S THE INQUIRY.
3 GO AHEAD, BROADEN THE INQUIRY.
4 Q BY MR. CARLTON: FIRST OF ALL, DO
5 YOU KNOW OF ANY OTHER SOURCES OF INCOME TO
6 MR. BOEKEN IN 1998 BESIDES NOVA L.L.C.?
7 A. IN HIS 1998 RETURN PREPARED BY MISS
8 TUBEROSI THERE'S REFERENCE TO ANOTHER PROJECT
9 CALLED NICHELSON AND SOMETHING CALLED RIATTA
10 ENERGY. AND I DO NOT KNOW AT THIS POINT THE
11 PARTICULARS OF THOSE TRANSACTIONS.
12 Q. AND WHAT YOU SAW IN THE TUBEROSI
13 RETURN, THOUGH, WAS A LOSS FOR NICHELSON; RIGHT?
14 A. I SAW A LOSS, BUT I SAW SOMETHING
15 IN THERE IN HER HAND-PREPARED COPY WHICH DOESN'T
16 MAKE SENSE TO ME. AND IT SAYS SOMETHING ABOUT A
17 CARRY OVER FROM -- CARRIED FROM '97 AND I DON'T
18 KNOW WHAT THAT MEANS.
19 Q. OKAY. SO FOR PURPOSES OF YOUR
20 PREPARING AN ESTIMATE OF HIS BUSINESS INCOME FOR
21 '98, YOU ARE RELYING ONLY ON NOVA L.L.C.?
22 A. AT THIS POINT, I AM RELYING ON THE
23 RECORDS THAT I HAVE CREATED FROM INFORMATION
24 PROVIDED FOR NOVA L.L.C.
25 Q. AND YOU UNDERSTAND THAT MR. BOEKEN
26 GETS MONEY FROM INVESTORS; RIGHT, IN THE COURSE OF
27 THIS BUSINESS?
28 A. THAT IS CORRECT.
3531

1 Q. AND ROYALTIES OF SOME SORT ARE PAID
2 OUT TO INVESTORS?
3 A. WELL, THEY ARE PAID OUT TO NOVA AND
4 THEN HE, IN TURN, MAKE THE PAYMENTS TO THE
5 INVESTORS BECAUSE THIS IS A RETURN ON THEIR
6 INVESTMENT.
7 Q. AND YOU HAVE CREATED SOMETHING YOU
8 HAVE CALLED A PROFIT AND LOSS STATEMENT BASED ON A
9 REVIEW OF MR. BOEKEN'S BANK STATEMENTS; RIGHT?
10 A. BANK STATEMENTS AND THE CHECKS, THE
11 CANCELED CHECKS.
12 Q. THESE BANK STATEMENTS YOU LOOKED AT
13 WERE AN ACCOUNT FOR NOVA L.L.C.; RIGHT?
14 A. THAT IS CORRECT.
15 Q. IT WAS NOT A PERSONAL ACCOUNT?
16 A. IT WAS AN ACCOUNT FOR NOVA L.L.C.
17 Q. BUT MR. BOEKEN DID HAVE OTHER BANK
18 ACCOUNTS?
19 A. HE HAD A PERSONAL BANK ACCOUNT.
20 Q. THIS SHOULD ONLY TAKE A FEW
21 SECONDS.
22 A. AM I SUPPOSED TO BE LOOKING AT
23 SOMETHING?
24 Q. NOTHING TO LOOK AT YET.

25 THIS IS DEFENDANT'S EXHIBIT 7439.
26 NOW, MR. LEWAK, IS THIS THE PROFIT AND LOSS
27 STATEMENT THAT YOU GENERATED FOR NOVA L.L.C. FOR
28 1998?

3532

1 A. YES, IT IS.

2 Q. AND LET'S JUST LOOK AT IT FOR A
3 MINUTE.

4 I NOTICE YOU HAVE GOT INCOME AT THE
5 TOP; RIGHT?

6 A. RIGHT.

7 Q. AND THAT TOTALS \$231,128.57;

8 CORRECT?

9 A. CORRECT.

10 Q. THAT REPRESENTS ALL OF THE DEPOSITS
11 INTO THIS NOVA L.L.C. BANK ACCOUNT, DOESN'T IT?

12 A. NOT ALL THE DEPOSITS, BUT A PORTION

13 OF THE DEPOSITS.

14 Q. WHICH DEPOSITS DID YOU EXCLUDE?

15 A. I EXCLUDED A SERIES OF TWO DEPOSITS
16 WHICH CAME FROM ANOTHER COMPANY WHICH WERE
17 CONNECTED TO ANOTHER VENTURE THAT HE HAS WITH

18 ANOTHER PARTNER.

19 Q. THAT WOULD BE NOVA PINION?

20 A. NOVA PINION.

21 Q. WHAT WAS THE SIZE OF THOSE TWO
22 DEPOSITS?

23 A. \$481,000, I BELIEVE.

24 Q. SO \$481,000 OF DEPOSITS INTO THIS
25 ACCOUNT YOU EXCLUDED?

26 A. CORRECT.

27 Q. ALTHOUGH MR. BOEKEN TOLD YOU THAT
28 ALL OF THE DEPOSITS INTO THIS ACCOUNT WERE INCOME

3533

1 TO HIM, DIDN'T HE?

2 A. I ASKED HIM WHETHER THOSE TWO
3 DEPOSITS CAME FROM THIS OTHER SOURCE. AND I MADE
4 THE DETERMINATION FROM OTHER INFORMATION THAT I HAD
5 THAT IT WAS NOT INCOME TO THIS COMPANY BUT FUNDS
6 THAT BELONGED TO NOVA PINION.

7 Q. ALL RIGHT. THAT WAS YOUR CALL?

8 A. THAT WAS MY CALL BASED UPON MY
9 QUESTION TO HIM AS TO WHAT THE TWO LARGE DEPOSITS
10 WERE FOR AND WHERE THEY CAME FROM. THEY WERE
11 IDENTIFIED AS TO WHERE THEY CAME FROM.

12 Q. OKAY. JUST SO WE UNDERSTAND WHAT
13 THOSE TWO LARGE DEPOSITS WERE FOR, THERE WAS THIS
14 OTHER PARTNERSHIP CALLED NOVA PINION; RIGHT?

15 A. THAT IS CORRECT.

16 Q. AND THAT WAS A PARTNERSHIP BETWEEN
17 NOVA L.L.C. AND SOMETHING CALLED J.P.K. PARTNERS?

18 A. CORRECT.

19 Q. NOVA L.L.C. HAD A ONE PERCENT
20 OWNERSHIP INTEREST?

21 A. YES, CORRECT.

22 Q. J.P.K. PARTNERS SENT \$481,000 INTO,
23 THAT WAS DEPOSITED INTO THIS ACCOUNT; RIGHT?

24 A. THAT IS CORRECT.

25 Q. AND \$450,000 WERE EVENTUALLY SENT
26 OUT?

27 A. WELL, I THINK IT WAS \$440,000.

28 Q. OKAY, 440. WAS EVENTUALLY SENT

3534

1 OUT?
2 A. RIGHT.
3 Q. SO THAT IS A WASH. THAT STUFF
4 JUSTICE APPEARS FROM YOUR CALCULATIONS?
5 A. IT IS NOT INCLUDED IN THIS REPORT.
6 Q. OKAY. NOW, WHAT ARE THE SOURCES OF
7 THE \$231,000?
8 A. INVESTORS' MONEY.
9 Q. DO YOU HAVE COPIES OF THE DEPOSIT
10 SLIPS?
11 A. NO, I DON'T.
12 Q. DO YOU HAVE ANY EVIDENCE OF WHAT
13 THE SOURCES OF THAT INCOME IS?
14 A. I DON'T HAVE ANY DIRECT EVIDENCE
15 OTHER THAN THERE'S SOME ENTRIES IN MR. BOEKEN'S
16 DOME RECORDS FOR 1998 LISTING SOME NAMES WHICH ARE
17 INVESTORS. IT'S NOT A COMPLETE RECORD. I RELIED
18 UPON MR. BOEKEN WHEN HE TOLD ME THAT THE MONEY
19 DEPOSITED CAME FROM INVESTORS.
20 Q. SO YOUR ONLY EVIDENCE REALLY IS MR.
21 BOEKEN'S STATEMENTS THAT ALL OF THIS MONEY CAME
22 FROM INVESTORS?
23 A. YES, AT THIS POINT, THAT IS WHAT I
24 RELIED UPON.
25 Q. SO YOU DON'T KNOW HOW MANY
26 INVESTORS THERE WERE?
27 A. I DON'T.
28 Q. YOU DON'T KNOW --
3535
1 A. I MEAN, I COULD GUESS, BUT I DON'T
2 THINK YOU WANT ME GUESSING.
3 Q. YOU DON'T KNOW HOW MUCH EACH
4 INVESTOR PUT IN?
5 A. NO, I DON'T.
6 Q. YOU DON'T KNOW WHEN THEY PUT IT IN,
7 INDIVIDUALLY?
8 A. NOT INDIVIDUALLY. I COULD
9 DETERMINE THAT, PERHAPS, WITH ADDITIONAL
10 INFORMATION AND ADDITIONAL WORK BUT THAT WAS NOT
11 WITHIN MY TIMEFRAME AT THE PRESENT MOMENT.
12 Q. NOW, IT'S POSSIBLE, ISN'T IT, THAT
13 SOME OF THE MONEY IN THIS ACCOUNT COULD BE
14 ROYALTIES PAID TO NOVA L.L.C.?
15 A. OH, YES. THAT'S VERY POSSIBLE.
16 Q. AS A MATTER OF FACT, THIS LINE ITEM
17 HERE, ROYALTY EXPENSE, \$14,500, DO YOU SEE THAT?
18 A. YES.
19 Q. DOESN'T THAT SUGGEST TO YOU THAT
20 THERE WERE, IN FACT, ROYALTY PAYMENTS PUT INTO THIS
21 ACCOUNT?
22 A. IT MAY OR MAY NOT. THAT \$14,500
23 CONTAINS ONE ITEM IN THERE I THINK FOR ABOUT
24 \$10,000 THAT WAS MISCLASSIFIED. IT SHOULD HAVE
25 BEEN TREATED AS A REDUCTION OF THE INCOME UP ABOVE.
26 HE OCCASIONALLY WOULD MAKE REFUNDS
27 TO INVESTORS WHO, I GUESS, HAD SECOND THOUGHTS OR
28 BUYER'S REMORSE ABOUT INVESTING IN THE COMPANY. SO
3536
1 THERE WERE SEVERAL REFUNDS TO INVESTORS. AND THAT
2 145 INCLUDES \$10,000 OF SUCH A REFUND.
3 Q. BUT AS WE SIT HERE TODAY, YOU DON'T
4 KNOW HOW MUCH OF THAT INCOME ITEM, HOW MANY OF THE
5 DEPOSITS INTO THIS ACCOUNT WERE ROYALTY PAYMENTS?

6 A. I DON'T. BUT TO ME, IT'S INCOME.
7 Q. INCOME TO?
8 A. TO NOVA WHICH -- PARDON ME.
9 Q. TO MR. BOEKEN?
10 A. WELL, TO NOVA.
11 Q. NOT NECESSARILY TO MR. BOEKEN,
12 THOUGH?
13 A. WELL, MR. BOEKEN AND HIS WIFE ARE
14 THE OWNER OF THE COMPANY, SO INDIRECTLY, IT'S
15 MR. BOEKEN.
16 Q. BUT THEIR ARRANGEMENT WAS TO PAY
17 THE ROYALTIES TO THE INVESTORS, THEN IT WOULDN'T BE
18 INCOME TO THEM, WOULD IT, OR IT WOULD BE A WASH?
19 A. IT WOULD BE A WASH ULTIMATELY. I
20 MEAN, THERE MAY BE A TIMING DIFFERENCE, THE MONEY
21 COULD HAVE COME IN LATE IN 1998 AND PERHAPS PAID
22 OUT IN EARLY '99. I DON'T KNOW.
23 Q. DO YOU KNOW IF ANY AMOUNT OF THE
24 DEPOSITS INTO THIS ACCOUNT WERE TRANSFERS FROM
25 OTHER ACCOUNTS THAT MR. BOEKEN HAD?
26 A. I DON'T, BUT I BELIEVE NOT.
27 Q. GIFTS, YOU DON'T KNOW IF ANY GIFTS
28 WERE INCLUDED IN THERE?
3537
1 A. NOT THAT I AM AWARE OF.
2 Q. IS THERE ANY EVIDENCE TO THE
3 CONTRARY?
4 A. I AM SORRY, WHAT?
5 Q. YOU DON'T KNOW WHETHER THERE WERE
6 ANY GIFTS INCLUDED IN THAT AMOUNT?
7 A. I DON'T KNOW, BUT I HAVE NO
8 EVIDENCE TO INDICATE THAT THERE ARE GIFTS INCLUDED.
9 Q. OR LOANS, THERE COULD BE LOANS
10 INCLUDED IN THIS?
11 A. THERE COULD BE, BUT I HAVE NO
12 EVIDENCE TO INDICATE THAT THERE IS.
13 Q. SO AT THIS POINT, YOUR ONLY
14 EVIDENCE AS TO WHETHER THIS IS INCOME TO MR. BOEKEN
15 IS HIS STATEMENT THAT THIS IS INCOME; RIGHT?
16 A. TO A CERTAIN EXTENT.
17 Q. SO THIS IS THE PROFIT AND LOSS, YOU
18 TAKE \$231,000 INCOME, YOU HAVE TOTLED UP A BUNCH
19 OF EXPENSE ITEMS HERE, THE NETS, AT \$63,000 IN
20 EXPENSES; RIGHT?
21 A. THAT'S WHAT IT SAYS, YES.
22 Q. AND THE NET IS \$167,000?
23 A. CORRECT.
24 Q. NOW, YOU ALSO GENERATED AN EXPENSE
25 SUMMARY -- ACTUALLY, LET ME GO TO ONE OTHER THING.
26 YOU GENERATED A GENERAL LEDGER;
27 RIGHT?
28 A. YES, WE DID.
3538
1 Q. AND THAT WAS BASICALLY JUST A
2 SUMMARY OF ALL OF THE CHECKS AND FUNDS IN THIS
3 ACCOUNT?
4 A. A SUMMARY OF ALL TRANSACTIONS
5 OCCURRING THROUGH BANK ACCOUNTS FOR THE YEAR.
6 Q. IS THIS YOUR COPY OF THE GENERAL
7 LEDGER AS OF DECEMBER 31ST THAT YOU DID?
8 A. YES, IT LOOKS THAT WAY.
9 Q. AND THEN MOST OF THESE TRANSACTIONS
10 WOULD BE CHECKS?

11 A. I AM NOT SURE WHICH BANK ACCOUNT I
12 AM LOOKING AT OR WHAT ACCOUNT I AM LOOKING AT.
13 WHAT DOES IT SAY IN THE UPPER
14 LEFT-HAND CORNER WHERE THE PAPER CLIP IS?
15 Q. THAT'S JUST A DATE.
16 A. NO, IT SAYS "BANK OF AMERICA."
17 Q. I AM SORRY, BANK OF AMERICA?
18 A. THAT'S THE ACTIVITY THROUGH THE
19 BANK OF AMERICA ACCOUNT FOR THE EARLY PART OF THE
20 YEAR.
21 Q. AND THEN THE REST OF IT IS CAL FED?
22 A. THAT'S THE MAJOR ACCOUNT FOR THE
23 BALANCE OF THE YEAR.
24 Q. AND JUST LOOKING AT THIS
25 TRANSACTION RECORD, MOST OF THESE ACCOUNTS START IN
26 MARCH; RIGHT?
27 A. THE ACCOUNT WAS OPENED IN EARLY OR
28 MID-MARCH, I BELIEVE.

3539
1 Q. AND THERE ARE, I AM NOT GOING TO GO
2 THROUGH ALL OF THIS, BUT THERE'S PAGE AFTER PAGE OF
3 TRANSACTIONS.

4 A. CORRECT.
5 Q. FROM MARCH THROUGH DECEMBER?
6 A. YES.
7 Q. AND THEY WOULD INCLUDE CHECKS,
8 CHECKS TO ALL SORTS OF ENTITIES. HERE'S ONE TO
9 TOYS R US?

10 A. WELL, THAT WAS PROBABLY A PERSONAL
11 EXPENDITURE.

12 Q. THERE ARE QUITE A FEW OF THOSE
13 PERSONAL TYPE CHECKS WRITTEN HERE, WEREN'T THERE?
14 A. YES, THERE WERE.

15 Q. OKAY. SO THAT'S YOUR GENERAL
16 LEDGER.
17 AND THAT IS DEFENDANTS' EXHIBIT
18 7441.

19 AND YOU ALSO THEN DID A BALANCE
20 SHEET?

21 A. YES, I DID.
22 Q. THIS IS ON THE -- THIS IS ALSO
23 ANOTHER QUICK BOOKS --
24 A. YES.
25 Q. -- EFFORT. SO LET'S JUST LOOK REAL
26 QUICKLY AT THE BALANCE SHEET.
27 CAN YOU EXPLAIN, WHAT IS A BALANCE
28 SHEET?

3540
1 A. A BALANCE SHEET IS A STATEMENT OF
2 THE ASSETS AND LIABILITIES AND THE NET WORTH OF A
3 BUSINESS ENTITY.

4 Q. AND SO THIS IS A BALANCE SHEET FOR
5 NOVA L.L.C.; RIGHT?
6 A. CORRECT.

7 Q. BASED ON THE INFORMATION YOU GOT
8 FROM THE BANK STATEMENTS AND OTHER DOCUMENTS?
9 A. YEAH, FROM MY -- WELL, FROM THE
10 BANK STATEMENT RECORDS FOR NOVA FOR 1998, IT WAS
11 PREPARED BY QUICKEN SOFTWARE -- QUICK BOOKS, I AM
12 SORRY.
13 Q. SO WHAT THIS SHOWS, IT STARTS AT
14 THE TOP AND IT SAYS "ASSETS"?
15 A. YES.

16 Q. AND YOU LOOKED AT THE TWO CHECKING
17 AND SAVINGS ACCOUNTS, THE BANK OF AMERICA ACCOUNT
18 THAT YOU JUST MENTIONED AND THE CAL FED ACCOUNT;
19 RIGHT?

20 A. CORRECT.

21 Q. SO AS OF THE END OF THE YEAR, THERE
22 WAS A NEGATIVE \$378,000 IN THE BANK OF AMERICA?
23 A. WELL, THAT ACCOUNT WAS ACTUALLY
24 CLOSED OUT WITH SOME SORT OF A DEPOSIT EARLY OR
25 SOMETIME IN MARCH, I BELIEVE.

26 Q. I AM SORRY. I WANT TO BE CLEAR,
27 IT'S \$378?

28 A. \$378, YES.

3541

1 Q. AND THE CAL FED ACCOUNT AT THE END
2 OF THE YEAR SHOWED A NEGATIVE \$62,022?

3 A. CORRECT.

4 Q. AND AS A MATTER OF FACT, THROUGHOUT
5 THE YEAR, IN THAT ACCOUNT, THERE WERE A NUMBER OF
6 N.S.F. CHECKS, NOT SUFFICIENT FUND CHECKS?

7 A. I BELIEVE SO.

8 Q. ABOUT 50 OF THEM?

9 A. I DON'T KNOW THE NUMBER.

10 Q. AND EACH OF THOSE WAS ASSOCIATED
11 WITH A BANK CHARGE, WASN'T IT?

12 A. I BELIEVE SO.

13 Q. HOW DID YOU TREAT THAT CHARGE?

14 A. I'D HAVE TO TAKE A LOOK AT MY
15 GENERAL LEDGER AND SEE IF THEY WERE THROWN INTO A
16 BANK CHARGE ACCOUNT AS AN EXPENSE OR WHETHER THEY
17 ARE TREATED AS A PERSONAL EXPENSE.

18 Q. OKAY. BUT IN ANY EVENT, AT THE END
19 OF THE YEAR, AS OF THE END OF THE YEAR OF 1998, IT
20 APPEARED THIS ACCOUNT WAS OVER DRAWN?

21 A. IT WAS OVER DRAWN ON THE BOOKS.

22 Q. AND LOOKING AT LIABILITIES,
23 ACTUALLY, LET'S LOOK AT -- IT SAYS LIABILITIES AND
24 EQUITY?

25 A. CORRECT.

26 Q. YOU HAVE LISTED HERE \$41,000
27 CURRENT LIABILITIES TO NOVA PINION?

28 A. UH-HUH.

3542

1 Q. WHAT WAS THAT?

2 A. WELL, THAT'S THE DIFFERENCE BETWEEN
3 THE \$481,000 WHICH WAS RECEIVED FOR THIS NOVA
4 PINION VENTURE, MINUS THE \$440,000 THAT WAS PAID
5 OUT ON THEIR BEHALF.

6 Q. THEN, SO THAT IS THE ONLY LIABILITY
7 YOU ACTUALLY LISTED HERE?

8 A. THAT'S THE ONLY LIABILITY LISTED.

9 Q. THEN YOU GO DOWN TO EQUITY?

10 A. YES.

11 Q. AND YOU -- THE FIRST ITEM THERE IS
12 DRAW, R. BROKEN?

13 A. CORRECT.

14 Q. \$267,202?

15 A. UH-HUH.

16 Q. RIGHT?

17 A. RIGHT.

18 Q. SO THAT IS -- THAT REFLECTS WHAT,
19 CHECKS, HOW DID YOU GET TO THAT?

20 A. THOSE ARE THE PERSONAL EXPENDITURES

21 PAID THROUGH THE BUSINESS DURING THE YEAR.

22 Q. SO YOU HAVE GOT A NET INCOME TO THE

23 BUSINESS FOR THE YEAR OF \$167,000; RIGHT?

24 A. CORRECT.

25 Q. AND A DRAW GOING OUT TO MR. BOEKEN

26 OF \$267,000?

27 A. THAT IS CORRECT.

28 MR. CARLTON: WOULD THIS BE A GOOD TIME,

3543

1 YOUR HONOR?

2 THE COURT: FINE.

3 LADIES AND GENTLEMEN, WE WILL TAKE

4 OUR NOON BREAK AND SEE YOU ALL BACK HERE AT 1:30

5 THIS AFTERNOON. DON'T DISCUSS THE CASE WITH

6 ANYONE.

7

8 (THE FOLLOWING PROCEEDINGS

9 WERE HELD IN OPEN COURT OUT

10 OF THE PRESENCE OF THE JURY:)

11

12 THE COURT: WE ARE OUTSIDE THE PRESENCE

13 OF THE JURY.

14 COUNSEL, THERE HAS BEEN SOME

15 DISCUSSION REGARDING THE NET WORTH OF PHILIP MORRIS

16 AND TESTIMONY REGARDING THAT. AND I UNDERSTAND

17 THAT THERE'S GOING TO BE A DEPOSITION OCCURRING

18 THIS AFTERNOON. AM I CORRECT?

19 MR. CARLTON: THAT'S MY UNDERSTANDING,

20 YOUR HONOR.

21 THE COURT: THE COURT HAS LOOKED AT SOME

22 CASES AND PARTICULARLY FOCUSED ON THE THOMAS SELLA

23 CASE. AND THE COURT MUST TURN TO THE PLAINTIFF AT

24 THIS POINT, I THINK, AND INQUIRE OF PLAINTIFF'S

25 COUNSEL IF HE IS READY TO DISCUSS THIS. IF NOT,

26 WE CAN DISCUSS IT LATER. BUT WE ARE GOING TO HAVE

27 TO COME TO GRIPS WITH THIS ISSUE OF THE SCOPE OF

28 THE NET WORTH FIGURE.

3544

1 MR. PIUZE: SEEING THAT I DO NOT

2 ANTICIPATE HAVING A FULL AFTERNOON OF TESTIMONY

3 HERE, IT MIGHT BE BETTER TO DO IT WHEN WE ARE DONE

4 WITH THE TESTIMONY.

5 THE COURT: I WILL BE MORE THAN HAPPY TO

6 DO THAT.

7 MR. PIUZE: THANK YOU.

8

9 (AT 12 NOON, THE LUNCH

10 RECESS WAS TAKEN TO

11 1:30 P.M. OF THE SAME DAY.)

12

13

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1 MASTER INDEX
2
3 DAY DATE PAGE VOLUME
4 TUESDAY APRIL 24TH, 2001 3440 22A
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W I T N E S S E S
10
11 WITNESS DIRECT CROSS REDIRECT RECROSS
12 SARNA, 3441 3483 3487
GREGORY
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14 LEWAK, 3489 3524
BERNARD
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E X H I B I T S
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FOR IN
5 DESCRIPTION IDENTIFICATION EVIDENCE VOL.
6 8050.00 - BLOWUP OF 3449
MEDICAL ILLUSTRATION
7
8050.01 BLOWUP OF 3464
8 MEDICAL ILLUSTRATION
9 8050.02 - BLOWUP OF 3472
MEDICAL ILLUSTRATION
10
10,005 - MEDICAL 3481
11 RECORDS
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